BALL JANIK LLP

ATTORNEYS

1455 F STREET, NW, SUITE 225
WASHINGTON, D.C. 20005
www.balljanik.com
TELEPHONE 202-638-3307
FACSIMILE 202-783-6947

LOUIS E. GITOMER
OF COUNSEL
(202) 466-6532

lgitomer@dc.bjllp.com

April 5, 2005

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Room 700
Washington, D. C. 20423

RE: Finance Docket No. 34540, *The Columbus & Ohio Rail Road Company–Acquisition and Operation Exemption–Rail Line of CSX Transportation, Inc.*

Dear Secretary Williams:

Enclosed for efiling are the Response of CSX Transportation, Inc., in PDF and Word format. Thank you for your assistance.

Thank you for your assistance. If you have any questions please call or email me.

Sincerely yours,

Louis E. Gitomer
Attorney for: CSX Transportation, Inc.

cc: Parties of Record

BEFORE THE

SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34540

THE COLUMBUS & OHIO RIVER RAIL ROAD COMPANY–ACQUISITION AND OPERATION EXEMPTION—CSX TRANSPORTATION, INC.

RESPONSE OF CSX TRANSPORTATION, INC. TO UNITED TRANSPORTATION UNION SUPPLEMENTAL PETITION TO REVOKE

Louis E. Gitomer, Esq.
Ball Janik, LLP
1455 F Street, NW, Suite 225
Washington, DC 20005
(202) 638-3307

Ronald M. Johnson, Esq.
Jonathan Krell, Esq.
Akin Gump Strauss Hauer & Feld LLP
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036-1564
(202) 887-4000

Attorneys for: CSX TRANSPORTATION, INC.

Dated: April 5, 2005

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SURFACE TRANSPORTATION BOARD

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THE COLUMBUS & OHIO RIVER RAIL ROAD COMPANY–ACQUISITION AND OPERATION EXEMPTION—CSX TRANSPORTATION, INC.

RESPONSE OF CSX TRANSPORTATION, INC. TO UNITED TRANSPORTATION UNION SUPPLEMENTAL PETITION TO REVOKE

CSX Transportation, Inc. ("CSXT") opposes the Supplemental Petition to Revoke (the "Supplemental Revocation") filed on March 21, 2005 by the United Transportation Union ("UTU").[1] CSXT requests that the Surface Transportation Board ("Board") deny UTU's request to revoke the notice of exemption that permits The Columbus & Ohio River Rail Road Company ("CUOH") to acquire 120.35 miles of rail line from CSXT (38.2 miles by purchase and 82.15 miles by lease) (the "Transaction") by (1) purchasing (a) 36.4 miles between Columbus, OH, milepost BP 137.0, and Newark, OH, milepost BP 100.6, and (b) 1.8 miles in Newark, OH between milepost BBW 0.0 and milepost BBW 1.8; (2) leasing (a) 25.9 miles between Newark, OH, milepost BQ 0.00, and Mt. Vernon, OH, milepost BQ 25.90, (b) 51.11 miles between Cambridge, OH, milepost BP 49.49, and Newark, OH, milepost BP 100.60, and (c) 5.14 miles between Cambridge, OH, milepost BPB 0.0, and Byesville, OH, milepost BPB 5.14; and (3) incidental trackage rights of approximately 1.5 miles assigned by CSXT to CUOH over a line of the Ohio Southern Railroad, Inc. ("OSR") between milepost 16.7 and milepost 18.2 in

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[1] CSXT opposes the First Revocation, the Second Revocation, the Third Revocation and the Supplemental Revocation (collectively referred to as the "Revocation Requests"), as defined in this Response.

Zanesville, OH. The lines are located in Franklin, Licking, Muskingum, Knox, and Guernsey Counties, OH (the "Line").

UTU filed the Supplemental Revocation as a confidential document. CSXT has carefully prepared this Response so as not to make any confidential information public. CSXT believes that it better serves the public interest and the efficiency of the administrative decisional process to provide non-confidential information to the Board in a public filing. To that end, CSXT has not classified the Response as Confidential. Even though CSXT was not the party who provided discovery or classified the documents provided in discovery, CSXT does not intend its public filing to be a waiver of the Confidentiality of any documents or portions of documents not cited and specifically referred to in this Response. The documents and portions of documents not cited or specifically referred to by CSXT must remain confidential under the terms of the Surface Transportation Board's March 9, 2005 Protective Order.

BACKGROUND

As part of its ongoing network rationalization program, CSXT determined that the Line was an appropriate candidate, and requested bids from several shortline railroads. Based on its bid and experience in meeting the needs of its customers, CUOH, an existing Class III railroad, was selected by CSXT as the winning bidder. CSXT and CUOH then began negotiating the agreements to implement the transaction and CUOH began the exemption process before the Board.

Since CUOH began operating the Line on October 28, 2004, CSXT has not received a single complaint from any of the shippers on the Line concerning CUOH's service or operations. Nor has CSXT received any pleadings from shippers that were filed with the Board seeking the revocation of the exemption or the modification of the Transaction.

CUOH posted and served the notice required by 49 C.F.R. 1150.42(e) on August 27, 2004, and certified its compliance to the Board on August 30, 2004. On September 24, 2004, as corrected on September 29, 2005, CUOH filed a Notice of Exemption (the "Notice") with the Board under 49 C.F.R. 1150.41, *et seq.*, to acquire and operate approximately 114 miles of rail line: (1) by purchase, between Columbus, OH, milepost BP 138.0, and Newark, OH, milepost BQ 0.0, totaling approximately 32.6 miles; (2) by lease, between Mt. Vernon, OH, milepost BQ 25.9, and Cambridge, OH, milepost BP 49.49, via Newark, milepost BQ 0.0, totaling approximately 81.4 miles; and (3) by incidental trackage rights approximately 1.5 miles assigned by CSXT to CUOH over a line of the OSR between milepost 16.7 and milepost 18.2 in Zanesville, OH.

On October 5, 2004, UTU filed a certificate of service for a Petition to Revoke and an Amended Petition to Revoke that had been filed in Finance Docket No. 34536, *Indiana & Ohio Central Railroad, Inc.—Acquisition and Operation Exemption—CSX Transportation, Inc.*, but also referred to the Transaction identified in the Notice (the "First Revocation"). On October 19, 2004, CUOH filed a reply to the UTU's First Revocation.

The Board served a Notice of Exemption on October 21, 2004. UTU filed another Petition to Revoke on October 22, 2004 (the "Second Revocation"). On the same day, CUOH filed a Supplement to the Notice because of changes in the structure of the transaction (the "Supplemental Notice"). CUOH notified the Board that it was acquiring 120.35 miles from CSXT (38.2 miles by purchase and 82.15 miles by lease) through the addition of the following lines to those described in the Notice: (1) purchasing a 1.8-mile line in Newark, OH between milepost BBW 0.0 and milepost BBW 1.8; (2) leasing a 5.14-mile lien between Cambridge, OH, milepost BPB 0.0, and Byesville, OH, milepost BPB 5.14; and (3) purchasing an addition one-

mile segment at the end of the line between milepost BP 137 and milepost BP 138.

CUOH filed a reply on October 28, 2004 to UTU's Second Revocation. In that reply, CUOH objected to the discovery sought by UTU. On November 15, 2004, UTU filed a Motion to Compel discovery, to which CUOH replied on December 6, 2004.

The Board served a Notice of Exemption on December 20, 2004 that included the additional mileage CUOH sought to acquire in the Supplemental Notice.

On January 25, 2005, UTU filed a Supplemental Petition to Revoke (the "Third Revocation"), and on January 27, 2005, UTU filed a Renewed Motion to Compel. On February 7, 2005, CUOH filed separate response to UTU's Third Revocation and Renewed Motion to Compel. The Board granted UTU's Renewed Motion to Compel by decision served on February 22, 2005.

CUOH sought a protective order on March 3, 2005, which the Board granted by decision served on March 9, 2005 (the "*Protective Order*"). Thereafter, CUOH produced documents sought by UTU in discovery, and UTU filed another Supplemental Petition to Revoke Under Seal on March 21, 2005.[2]

CUOH will provide rail service over the Line. CSXT has retained overhead trackage rights on 36.4 miles of the Line being purchased by CUOH between milepost BP 137.00 and milepost 100.60 (the "Trackage Rights Line") so that CSXT will be able to serve the shippers on the portion of the line being leased by CUOH only upon termination of the lease or CUOH's discontinuance of service over the leased lines.

CSXT and CUOH have entered into several agreements in order to facilitate the Transaction. In the Petition, UTU attached the Land and Track Lease Agreement (the "Lease"),

[2] UTU did not file a public version of the Supplemental Petition to Revoke as required by section 6 of the *Protective Order* at page 5, and as requested by CSXT.

pages CUOH 0255-0304, the Purchase and Sale Agreement (the "Agreement"), pages CUOH 0228-0254, and the Freight Operating Agreement (the "FOA"), pages CUOH 0305-0339, which includes the Interchange Agreement, pages CUOH 0324-0335. CSXT and CUOH entered into other agreements in order to implement the Transaction. These agreements have been provided to UTU in discovery, but have not been referred to in the Supplement or filed with the Board.

As the Board is aware, the creation of a shortline railroad is not a simple matter. In addition to resolving economic concerns, the parties must address the rights, responsibilities and obligations of both parties to each other and to the property involved.

In the Supplemental Revocation, UTU argues that the Notice should be revoked allegedly because it contains false and misleading information and because the transaction was not *bona fide*, but instead was designed to remove jobs from under a UTU collective bargaining agreement with CSXT. For the reasons set forth below, UTU's allegations are without merit, and the request to revoke the exemption made in the Revocation Requests should be denied.

ARGUMENT

I. The Notice Of Exemption Does Not Contain False Or Misleading Information.

UTU alleges "that the notice of exemption contains false and misleading information". Supplemental Revocation at 2. However, nowhere in the Supplemental Revocation does UTU specify the "false and misleading information."

In this proceeding, CUOH was a Class III carrier seeking to expand its common carrier operations through a purchase and lease from CSXT. As such, CUOH was required to obtain approval from the Board to commence operations under 49 U.S.C. § 10902(a). In order to expedite and encourage the creation of expansion of short line railroads, the Board adopted a

class exemption from the approval process under section 10902.[3] The Board's rules implementing the exemption require a party filing a notice of exemption to provide certain information (49 C.F.R. § 1150.43) and to verify the accuracy of the information presented (49 C.F.R. § 1150.42(a)).

The Notice filed by CUOH (as amended and supplemented) provided all of the information required by 49 C.F.R. § 1150.43. The accuracy of the information in the Notice was verified by Mr. William A. Strawn II.

UTU, as petitioner, "must demonstrate that the notice contains false or misleading information."[4] In *Minnesota Northern*, the labor petitioners made five specific arguments concerning false and misleading information that was contained in the notice in that proceeding. The Board rejected all of petitioner's arguments concerning false and misleading information because they were minor, of no consequence, or *de minimis*.[5] In this proceeding, UTU has not made any specific claims as to those portions of the Notice that are false or misleading. UTU merely makes the statement without any support or specificity. As the party that must "demonstrate" false and misleading information, UTU has failed to meet its burden.

Since there has been no demonstration of false and misleading information by UTU, CSXT respectfully requests the Board to deny UTU's request to reject the Notice on that basis.

II. The Underlying Contracts Do Not Provide A Basis for Revocation.

UTU contends that in this proceeding there are "several unusual features which can only lead one to conclude the transaction is a device created merely to move a number of jobs out

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[3] *Class Exemp. for Acq. or Oper. Under 49 U.S.C. 10902*, 1 S.T.B. 95 (1996).
[4] *Minnesota Northern Railroad, Inc. –Exemption–Acquisition and Operation of Rail Line and Incidental Trackage Rights from Burlington Northern Railroad Company*, STB Finance docket No. 33315 (STB served August 14, 1997), at 3 ("*Minnesota Northern*").
[5] *Id.*, at 3-5.

from under a collective bargaining-agreement (CSXT) onto a nonunion carrier (CUOH)." Supplemental Revocation at 8. The supposedly "unusual features" are that CSXT will be CUOH's primary source of supply for freight cars, which somehow "entwines CUOH in such a manner as to essentially make the carrier a virtual piece of the CSXT system," and that CSXT allegedly maintains significant control over CUOH. Supplemental Revocation at 8.

As a preliminary matter, there is no basis for UTU's innuendo that this line sale and lease transaction was somehow designed to avoid CSXT's collective bargaining agreements or obligations with UTU. Significantly, the UTU does not assert that the sale or lease of rail lines by CSXT violates its labor agreements or rights under the Railway Labor Act. Nor could it. The Supreme Court has held that the sale of rail lines is a fundamental management prerogative. *Pittsburgh & Lake Erie Railroad Co. v. Railway Labor Executives Ass'n*, 491 U.S. 490 (1989). The UTU and CSXT's other unions have previously stipulated that "CSXT's ability to sell its lines is a managerial prerogative that is not limited by any existing agreement, either express or implied." *Railway Labor Executives Ass'n v. CSX Transportation, Inc.*, 938 F.2d 224, 228 (DC Cir. 1991). Since that decision, UTU has not negotiated any restrictions on CSXT's right to dispose of rail lines. In fact, UTU has recognized that CSXT retains the right to sell or lease lines by negotiating an agreement in 1994 to which CSXT is party, which addresses the effects on UTU members of Section 10901 transactions, but does not restrict CSXT's ability to sell or lease lines.

When unions have claimed that a sale or lease of a rail line to short lines violated their collective bargaining agreements, arbitrators have rejected such claims. For example, several unions argued that the lease of rail lines by the former Southern Pacific Transportation Company to a new short line, Willamette and Pacific Railroad, violated their agreements. The arbitration

board established under the Railway Labor Act, Special Board of Adjustment No. 1069, concluded "that the Organizations' claims that the scope and seniority provisions were violated by the Oregon branch lines leases and sales should be denied." SBA No. 1069, Case No. 1, *Southern Pacific Transportation Co. and American Train Dispatchers Ass'n, et al.* at 33 (1993) ("Attachment A"). Another arbitration board, Public Law Board No. 5949, similarly rejected union claims that the sale by Consolidated Rail corporation ("Conrail") of about 1,770 miles of track to short lines, with which Conrail then engaged in joint marketing efforts, violated Conrail's labor agreements. The arbitrator explained that "[t]he Board thus is constrained to conclude that the transactions in question appear to be arms-length transactions with bona fide carriers, that no relationship of principal and agent exists between the Carrier and Conrail Express carriers, and that the transactions consequently do not constitute subcontracting in violation of the Scope Rule of the Agreement." PLB No. 5949, *Transport Workers Union and Consolidated Rail Corp.* at 11 (1997) (Attachment B).

Thus, lacking any basis to challenge the transaction as a violation of its rights under its labor agreements, UTU is reduced to making vague arguments that the transaction with CUOH must have been motivated by some dark purpose, knowing that it cannot show that this arms-length transaction is a sham.

These are the same kinds of boilerplate contentions that UTU made in its Supplemental Petition to Revoke filed in *East Brookfield and Spencer Railroad, LLC–Lease and Operation Exemption–CSX Transportation, Inc.*, STB Finance Docket No. 34505 (filed December 17, 2004), and in other proceedings involving the sale or lease of rail lines by a Class I carrier to a short line railroad. The Board has rejected these kinds of general and unsupported, pro forma objections. *See, e.g., Meridian Southern Ry., LLC–Acquisition and Operation–Line of Kansas*

City Southern Ry. Co., STB Finance Docket No. 33854, STB served August 29, 2000, at 3-4 ("But our general policy is that a person seeking to revoke an exemption such as this must present not just generalized concerns, but rather some specific, particularized, and reasonable cause for concern in order for us to revoke an individual use of this class exemption.").

UTU argues that the circumstances here are unusual because CUOH is allegedly non-union. Whether a railroad has a unionized or non-union work force is not germane to any issues under 49 U.S.C. § 10902.

UTU also argues that CUOH was not the "logical choice" of carrier to acquire this line segment. Supplemental Revocation at 8. UTU does not explain what was illogical about CUOH or how the logic or illogic of the selection of CUOH has any bearing on national transportation policy or the requirements of Section 10902. But, CUOH was a "logical" choice. CUOH is an existing carrier with a proven record of providing service to rail shippers. CUOH's other rail lines are adjacent to the line acquired from CSXT, and CSXT and CUOH already interchange traffic. Indeed, CUOH shares operations with CSXT over a portion of the Line.

The fact that CSXT is the primary source of supply of freight cars for CUOH is not unusual in the industry. Short line railroads often rely on the Class I railroads with which they interchange for cars. Under the agreement between CSXT and CUOH, CSXT is not obligated to provide cars to CUOH, and CUOH is not precluded from acquiring cars itself.

The provisions in the contractual arrangements between CSXT and CUOH listed in the Supplemental Revocation are typical of these kinds of line sales and leases. UTU does not offer any explanation why they are supposedly unusual. The sale of track and long-term lease of track and right-of-way by CSXT to CUOH is simply one of many line transactions that CSXT has entered into over the last 25 years as it focuses its business on operations that make the most

business sense to it. *See, e.g., Central Railroad of Indianapolis–Lease and Operations Exemption–CSX Transportation., Inc.*, STB Finance Docket No. 34508 (STB served July 30, 2004); *M&B Railroad LLC–Acquisition and Operation Exemption–CSX Transportation., Inc.*, STB Finance Docket No. 34423 (STB served November 20, 2003); *R.J. Corman Equipment Co. LLC–Acquisition Exemption–Lines of CSX Transportation, Inc.*, STB Finance Docket No. 34386 (STB served September 12, 2003).

Finally, there is no basis for UTU's contention, again unsupported, that this transaction was a means to move jobs out from under UTU's collective bargaining agreements with CSXT. This was a legitimate arms-length transaction between two unrelated companies. The transaction met the business needs of each. It meets CSXT's goal of focusing its capital and other resources on rail lines that contribute in a meaningful way to its return on investment. It meets CUOH's goal of expanding its services in central Ohio. The Board has previously recognized on numerous occasions that these kinds of line lease and sale transactions are motivated by legitimate business needs. *See, e.g., Buckingham Branch Railroad Co.–Lease–CSX Transportation, Inc.*, STB Finance Docket No. 34495, Decision No. 6 (served November 5, 2004) ("*Buckingham*"); *Timber Rock Railroad, Inc. –Lease Exemption–The Burlington Northern and Santa Fe Ry. Co.*, STB Finance Docket No. 34503 (served October 8, 2004).

UTU further alleges that "the circumstances surrounding the transaction indicate that the transaction was not motivated by a desire of the parties to realize legitimate business goals," Supplemental Revocation at 8, without ever identifying what those circumstances are. UTU's inchoate arguments provide no basis for revocation of the Notice.

In its Supplemental Revocation, UTU makes passing reference to *Sagamore Nat'l Corp.–Acquisition and Operation Exemption–Lines of Indiana Hi-Rail Corp.*, ICC Finance Docket No.

32523 (ICC served October 28, 1994) ("*Saganat II*"), but fails to explain how this decision allegedly relates to the present matter. However, *Saganat II* is totally distinguishable from the present proceeding. In *Saganat II*, Sagamore National Corporation ("Saganat") filed a notice of exemption to acquire 398 miles of rail from Indiana Hi-Rail Corporation ("Hi-Rail"), which the Interstate Commerce Commission (the "ICC") rejected. In doing so, the ICC relied upon reasons that have no application in the present case. For instance, the ICC concluded that the evidence in *Saganat II* showed "substantial identity in interest between Hi-Rail and Saganat," because Hi-Rail and Saganat had the same address and UTU presented evidence that both entities had the same president. *Id.* In addition, the ICC had previously noted that Saganat and Hi-Rail had the same general counsel, the same executive vice president, and the same office manager.[6] The ICC also noted UTU's assertion that two senior executives of Hi-Rail comprise a majority of Saganat's interim Board of Directors. *Id.*

In contrast to the circumstances in *Saganat I* and *Saganat II*, there is no claim that CSXT and CUOH are not separate and independent entities. They are clearly two separate, independent entities. There is no overlap in management between the two carriers. Furthermore, unlike in *Saganat I* and *Saganat II*, the parties in the present proceeding entered into arm's length transactions for legitimate business purposes. CUOH has substantial operations in Ohio east of Newark. Contrary to UTU's implications, CSXT and CUOH cannot be deemed to be the same entity merely because they have entered the Lease, the Agreement and the FOA, among other agreements, or because CSXT has retained trackage rights between Columbus and Newark in order to serve shippers east of Newark in the event CUOH terminates the lease. These are typical aspects of leases to short lines.

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[6] *Sagamore Nat'l Corp. – Acquisition and Operation Exemption – Lines of Indiana Hi-Rail Corp.*, ICC Finance Docket No. 32523 (ICC served August 26, 1994) ("*Saganat I*").

The Board has previously rejected vague UTU objections to arm's length transactions such as those at issue in the present proceeding, where independent carriers enter into arrangements to meet legitimate business goals. For instance, UTU opposed a petition for exemption regarding the lease of track by Burlington Northern Railroad Company ("BN") to a short line railroad, Portland & Western Railroad, Inc. ("P&W").[7] Like the present proceeding, UTU "questioned the bona fides of the transaction" and argued that the transaction was a device created merely to move a number of jobs out from under a collective bargaining agreement to a nonunion carrier. However, the Board rejected UTU's arguments in *P&W*, concluding that the transaction was not intended to avoid collective bargaining agreement obligations and that "the circumstances surrounding the transaction indicate that the transaction was motivated by a desire of the lessor and lessee to realize legitimate business goals."[8]

There were several factors considered by the Board in the *P&W* proceeding that support the carriers' position in the present case. For instance, P&W and BN made clear to the Board in that proceeding that the entities involved were "independent, unaffiliated entities." In reaching its holding, the Board expressly relied upon this factor. The record in the present case shows that CSXT and CUOH are wholly independent entities. Also, in both the *P&W* proceeding and this one, the lessee/buyer maintained a significant degree of independence from the lessor/seller with respect to the operation of the short line's trains on the track and the maintenance of the track. Moreover, the transaction in the present case and in *P&W* both carried "the basic entrepreneurial risk that the venture will not succeed financially," and CSXT does not provide subsidies or guarantees to CUOH regarding minimum traffic volume.

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[7] *Portland & Western R.R., Inc. – Lease and Operation Exemption – Lines of Burlington Northern R.R. Co.*, STB Finance Docket 32766 (STB served October 15, 1997) ("*P&W*").
[8] *Id.* At 5.

III. UTU Fails To Show That Transaction Is Contrary To Requirements Of Section 10902.

CSXT has sold 38.2 miles to CUOH and leased 82.15 miles to CUOH.

In the Supplemental Revocation, pages 4-7, UTU identifies a number of requirements imposed on CUOH through the Lease, Agreement and FOA. UTU then concludes that CSXT "has maintained significant control over the property in the agreements noted herein." Supplemental Revocation at 8. UTU is wrong again.

UTU argues that a number of the terms in the Lease between CUOH and CSXT contain unusual features, are not for legitimate business purposes, or create less than an arms length arrangement between CUOH and CSXT. UTU's arguments are without merit.

Under the Lease, CSXT clarified the rights it was reserving in the 82.15-mile portion of the line it is leasing to CUOH (the "Leased Line"), imposed certain restrictions on CUOH's use of the Leased Line, and required certain obligations from CUOH, all as CUOH's landlord. CUOH agreed to the provisions in the Lease that clearly delineate the benefits of ownership retained by CSXT, the limits on CUOH's use of CSXT's Leased Line, and the obligations incurred by CUOH to protect the Leased Line. UTU attempts to cast a shadow over these reservations, restrictions and obligations that are normal in real estate leases without even explaining how these provisions are anything other than normal and the result of arms-length negotiations between willing parties.

UTU mentions the limitations on CUOH's ability to grant rights to other railroads to operate on the Leased Line. First, these limitations merely reflect the fact that the essence of this transaction was that CSXT leased and sold rail lines to CUOH to be used in CUOH's freight business. Second, CUOH can permit additional rail service on the Leased Line after obtaining consent from CSXT. Supplemental Revocation at page CUOH 0258.

UTU questions CSXT's right to inspect the buildings on the Leased Line, limitations on CUOH using the Leased Line as collateral for public funding, and limitations on the assignment of the Leased Line without CSXT's advance consent. These requirements simply reflect the fact that although CSXT no longer operates these rail lines, CSXT is still a landlord with respect to them. CSXT remains the owner of the buildings and must have the right inspect its asset. It is also proper for CSXT to be able to prohibit the use of the Leased Line as collateral for a loan that CUOH might seek to obtain. As with additional rail service, there is no prohibition against the assignment of the lease of the Leased Line; CUOH must merely obtain CSXT's advance consent if the assignment is not to a subsidiary (no approval is needed for CUOH to assign the lease of the Leased Line to a subsidiary). Supplemental Revocation at page numbered CUOH 0270.

UTU contends that CUOH is prohibited from building any structures on the Line. The Lease actually only preserves CSXT's property rights as a landlord concerning the use of its Leased Line by preventing the construction of permanent structures. At the end of the lease, CSXT would become responsible for them. Supplemental Revocation at page numbered CUOH 0271.

On pages 4-5 of the Supplemental Revocation, UTU notes that CSXT has reserved certain rights to the Leased Line, rental related to other uses of the Leased Line, and the ability to authorize the use of or alienate Leased Line that does not interfere with CUOH's operations. The Lease merely enumerates the rights that CSXT has reserved as the owner of the Leased Line; CSXT's reserved rights have nothing to do with CUOH's common carrier operation of the Line.

There are several provisions where the Lease requires CUOH to procure insurance to protect CSXT's interest in the Leased Line. It is a prudent business decision to require a tenant

to provide insurance to protect the landlord from any potential damage to the Landlord's property caused by the tenant's railroad operations.

UTU also states that the Lease permits CSXT to conduct an audit at any time and to operate passenger service. Since CSXT owns the Leased Line and has entered a business arrangement with CUOH, CSXT has reserved the right to verify the results under the Lease. As far as passenger operations are concerned, CSXT has prohibited CUOH from operating passenger service on the Leased Line because of potential liability, but retains to itself the right to authorize or conduct passenger, commuter, special or excursion trains. Supplemental Revocation at page numbered CUOH 0277. CSXT has only clarified the parties' rights in the event that in the future a party requests a type of passenger operation over the Leased Line. Moreover, the Lease to CUOH was solely for CUOH to operate a freight railroad. The passenger restriction does not affect the freight business, for which the Board granted the exemption.

Under the Agreement, UTU highlights three interests retained by CSXT.

First, CSXT retained the rights to three fiber optics contracts over the 38.2 miles being sold to CUOH (the "Sold Line"), and these were considered in arriving at the sale price.

Second, UTU claims that CSXT has the right to monitor all environmental procedures by CUOH. UTU is wrong. Section 8.b. of the Agreement governs CUOH's environmental inspection of the Sold Line prior to the closing, not during CUOH's ownership. Section 8.b. must be read in conjunction with section 8.a., and not as an independent portion of the Agreement. Supplemental Revocation at page numbered CUOH 0232.

Third, UTU states that CUOH cannot assign the Agreement without the consent of CSXT. However in section 17 of the Agreement, CUOH can assign the Agreement with CSXT's "written consent ... which shall not be unreasonably withheld." Supplemental

Revocation at page numbered CUOH 0236.

Under the FOA, CSXT bills and collects freight charges and forwards payments to CUOH. This efficient process results in savings for CUOH and provides its customers with only one bill for freight service and one place to make payment. The practice of one carrier billing the customer and sharing the revenue with a connecting carrier is a common arrangement even among Class I carriers. Moreover, CSXT audits the volume of CUOH's moves to determine whether CSXT's payments are accurate and whether CUOH owes CSXT any additional rent.

Although CSXT is CUOH's primary source of rail cars, CSXT is not obliged to provide rail cars and is not the exclusive source of rail cars. If CSXT provides a CSXT car to CUOH, then CUOH must meet certain requirements that generally apply to all CSXT rail cars and connections. CSXT is not requiring CUOH to do anything out of the ordinary.

UTU mentions that CUOH must pay CSXT each time it interchanges a car with CSXT that is not owned by CSXT. UTU is wrong. The FOA does not require an additional payment from CUOH to CSXT if it interchanges a car that is not owned by CSXT to CSXT. Supplemental Revocation at page numbered CUOH 0311.[9]

UTU also raises the interchange agreements between CUOH and CSXT at Parsons Yard in Columbus, OH. As the Board well knows, every short line railroad must interchange traffic with another railroad. Interchange agreements set forth the rights and obligations of both parties to an interchange and specify where the physical interchange is to occur. Occasionally one railroad is granted access to the other railroad's line to affect interchange at a convenient location on that railroad. Restricting service along such a line to interchange and prohibiting service to local shippers is typical throughout the railroad industry and goes back to the early days of

[9] CSXT has calculated a purely cost based factor of potential additional rent, which the parties agreed to through arms-length negotiations, as was the case in *Buckingham*.

railroading and thus is nothing unusual in this arrangement.

It has been CSXT's experience that all of the provisions of the Lease, Agreement and FOA cited by UTU are typical in the short line railroad business. The Lease and Agreement were negotiated at arms length by an independent willing transferor and an independent willing transferee under the same guidelines that have been used for dozens of transactions for other CSXT transactions.

IV. The rail transportation policy does not require revocation of the exemption.

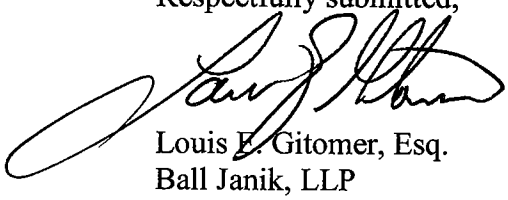
UTU has totally ignored the requirement under 49 U.S.C. § 10502(d) that only permits revocation of an exemption when the Board finds that application of regulation is necessary to carry out the transportation policy of 49 U.S.C. § 10101. UTU has not cited a single provision of the transportation policy that warrants revocation of the exemption. Indeed, the instant arms-length transaction which transfers the common carrier obligation over the Line from CSXT to CUOH fosters many provisions of the transportation policy and is contrary to none. CUOH's purchase of the Sold Line and lease of the Leased Line from CSXT will permit competition to establish reasonable rate (10101(1)), minimize the need for regulatory control (10101(2)), promote a safe and efficient rail transportation system (10101(3)), ensure development of a sound rail transportation system (10101(4)), foster sound economic conditions in transportation (10101(5)), reduce regulatory barriers to entry (10101(7)), encourage honest and efficient management (10101(9)), and provide for the expeditious handling of this proceeding (10101(15)).

UTU has not claimed that a single provision of the rail transportation policy requires regulation of this transaction and has not justified revocation of this exemption under the statutory standards.

CONCLUSION

UTU has failed to justify revocation of the exemption in this proceeding. The Transaction between CSXT and CUOH is a *bona fide* transaction based on substantial business reasons and was not entered into for the purpose of removing work from under CSXT's collective bargaining agreement with UTU. Accordingly, CSXT respectfully requests the Board to deny the Supplement and all other opposition filed by UTU.

Respectfully submitted,



Louis E. Gitomer, Esq.
Ball Janik, LLP
1455 F Street, NW, Suite 225
Washington, DC 20005
(202) 638-3307

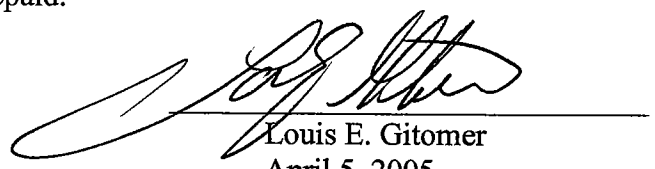
Ronald M. Johnson, Esq.
Jonathan Krell, Esq.
Akin Gump Strauss Hauer & Feld LLP
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036-1564
(202) 887-4000

Attorneys for: CSX TRANSPORTATION, INC.

Dated: April 5, 2005

CERTIFICATE OF SERVICE

I hereby certify that I have caused the Response of CSX Transportation, Inc. to United Transportation Union Supplemental Petition to Revoke to be served upon counsel for all parties of record by first class mail postage prepaid.



Louis E. Gitomer
April 5, 2005

ATTACHMENT A

Shopcraft Shawnee

SPECIAL BOARD OF ADJUSTMENT NO. 1069
SOUTHERN PACIFIC TRANSPORTATION COMPANY
AND ATDA, ET AL.
OREGON BRANCH LINES ARBITRATION
RICHARD R. KASHER, ARBITRATOR
AUGUST 9, 1993

Case 1

In the Matter of an Arbitration Between the

SOUTHERN PACIFIC TRANSPORTATION COMPANY

and

AMERICAN TRAIN DISPATCHERS ASSOCIATION
BROTHERHOOD OF RAILROAD SIGNALMAN
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
BROTHERHOOD OF LOCOMOTIVE ENGINEERS
INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS
INTERNATIONAL BROTHERHOOD OF BOILERMAKERS IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS
INTERNATIONAL BROTHERHOOD OF FIREMEN, OILERS, HELPERS, ROUNDHOUSE AND RAILWAY SHOP LABORERS
and
SHEET METAL WORKERS INTERNATIONAL ASSOCIATION

Special Board of Adjustment

Appearances:

John O'B. Clarke, Jr., Esquire
L. Pat Wynns, Esquire
Highsaw, Mahoney & Clarke
for the Organizations

Wayne M. Bolio, Esquire
Southern Pacific Transportation Company
for the Carrier

Introduction:

As the result of a decision by the Southern Pacific Transportation Company (hereinafter the "Carrier" or the "SP") to lease various of its branch lines in the state of Oregon to the Willamette & Pacific Railroad, Inc. (hereinafter the "W&P") and to the Willamette Valley Railway Company (hereinafter the "WVRY") and to sell certain other branch lines in the state of Oregon to the Molalla Western Railway (hereinafter the "MWRY") and in view of claims by the American Train Dispatchers Association, the Brotherhood of Railroad Signalmen, the Brotherhood of Maintenance of Way Employes, the Brotherhood of Locomotive Engineers, the International Association of Machinists and Aerospace Workers, the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, the International Brotherhood of Electrical Workers, the International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers and the Sheet Metal Workers International Association (hereinafter the "Organizations") that those branch line transactions violated the scope provisions in the existing collective bargaining agreements and/or the implied covenant of good faith dealing, and deprived the members of the involved crafts or classes of the opportunity and right to perform the work which they are entitled to by dint of said collective

bargaining agreements, the parties agreed to the establishment of this Special Board of Adjustment.

The below-signed Arbitrator was selected to serve as the "Board", and hearings were held before the Board on June 3 and 4, 1993 at the offices of the National Mediation Board in Washington, DC.

Prior to the commencement of said hearings, in accordance with arrangements between the Board and the parties' counsel, the Carrier and the Organizations filed pre-hearing statements of position supplemented by numerous documentary exhibits. At said hearing the parties were afforded a full opportunity to present evidence through the testimony of witnesses and in additional documentary proofs, and counsel had the opportunity to engage in a broad range of cross-examination. After the close of the evidentiary hearings further arrangements were made between counsel and the Board by which the parties had the opportunity to file post-hearing and reply briefs/submissions and certain specified additional documentary evidence.

Background Facts

Mr. E.L. Pruitt, General Chairman of the BLE, Mr. Michael Ashbridge, Local Chairman of the BLE, Mr. Richard Ford, General Chairman of the ATDA, Mr. Louis English, Local Chairman of the BLE, Mr. Clarence Foose, Vice President of the BMWE, Mr. Tom Kendall, Local Chairman of the IBofB, Mr. Daniel Carlin, Local

Chairman of the IBF&O, Mr. P.A. Larson, Local Chairman of the IAM, and Mr. Val VanArtsdalen, Vice President of the BRS testified in support of the Organizations' position that the transactions violated their respective collective bargaining agreements and that the methods by which the Carrier consummated the transactions evidenced a lack of good faith.

Mr. Thomas Matthews, the Carrier's Chief Administrative Officer who was also responsible for Labor Relations, and Mr. Kenneth Dixon, the Carrier's Managing Director of Plant Rationalization, testified regarding the considerations which the Carrier reviewed and the activities undertaken prior to the consummation of the leases and the sales.

SP, a subsidiary of Rio Grande Industries, Inc., and the St. Louis Southwestern Railway Company, known as the "Cotton Belt", operated a 11,699 mile rail system throughout the western and southwestern United States in 1988. A number of those rail lines are in the state of Oregon.

The Carrier has a main line entering Oregon from the California border, traveling north to Portland, with yards at Eugene, Albany and Salem. There is a second line which extends into Oregon from California, known as the Siskiyou Line, and this line connects with the Carrier's main line near Eugene, Oregon. Additionally, the Carrier operated several branch lines in Oregon; specifically, the Coos Bay Line extending from Eugene west to the coast and then south past Coos Bay, the West-Side

branch lines, which are a series of connected branches on the west side of the main line and which intersect with the main line near Portland and at Albany, and the East-Side Lines, which are separate lines on the east side extending off the main line, with one line connecting at Albany, one line connecting at Salem and Woodburn, and one line that is north of Canby. With the exception of the West-Side branch line running from Corvallis to Monroe and then to Dawson, none of the other SP lines in Oregon were listed on its system map as being "potentially subject to abandonment". These facts regarding the operation of the Carrier's lines were gleaned, essentially, from Organizations Exhibit Nos. 18 and 19, the Carrier's System Map and the detailed, computer-generated slide presentation conducted by the Organizations at the June 3 and 4, 1993 hearings.

There is also evidence in the record which establishes that each of the involved Labor Organizations and the Carrier are parties to collective bargaining agreements, which contain reasonably similar provisions regarding each craft or class' "scope" of work. Rather than identifying each of the relevant scope clauses and the specific language of each, it is enough to note that the members of each craft or class generally retain the "exclusive right" to the work covered by their agreement and the right, by dint of their seniority, to "preference in assignments". Each of those collective bargaining agreements were introduced by the Organizations in Exhibit Nos. 1 through 9

and were sponsored, verified and supported by the declarations of General Chairmen or International Representatives of the involved Organizations.

The genesis of the instant dispute began when the Carrier determined, due to financial considerations, that it would no longer operate the subject branch lines in Oregon. After some preliminary meetings with several of the Organizations, the Carrier notified its customers, on or about December 12, 1991, of its intent to lease certain branch lines and further advised that, while the SP was not "proposing discontinuance of rail service", it was seeking to provide such service in a "more flexible and cost efficient manner". At or about the same time, Mr. Dixon, the Carrier's Managing Director of Plant Rationalization, wrote to a number of the potentially concerned representatives of the Organizations as follows:

> When we begin a project involving possible divestiture of a branchline operation, it has been our practice to advise the affected shippers, politicians and our employees. As you know, we had an unintended breakdown in the notification process with the San Joaquin Valley project when my letter of February 13, 1991 was not distributed as requested. We do not wish to repeat that experience so I am sending you this advice individually.
>
> We are now beginning a project involving the branchline network in Oregon north of Eugene. Attached is a copy of the letter being sent to our branchline customers together with a map showing the lines which may be involved.
>
> Our Oregon Division Superintendent, Bob Melbo, has also scheduled meetings with all of the Local Chairmen and will provide them with this same information.
>
> As all of us attending the recent Leadership Conference in Burlingame know, we must make some serious changes to the way we do business if we

> expect this company to survive. Restructuring of light density feeder lines is one the things we must do.
>
> Many parts of our branchline network are very expensive to operate within our organizational structure. Survival of many lines will be dependent on our ability to use a work force more efficiently and to create an entirely new locally focused management structure.
>
> As we evaluate the possible options for the Oregon lines, I would welcome any suggestions from our employee representatives. We would give any employee group sponsored proposal for acquisition and/or operation of line segments very serious consideration and I would welcome the opportunity to discuss ideas with you.
>
> The effect on current employees is an important part of our evaluation of options. Accordingly, it is our desire to work with reputable shortline/regional operators who display an interest in offering current employees the opportunity to participate in a new company. We have also been very candid with all parties about the need for new operations to be economically sound without reliance on projections of new traffic.
>
> Please feel free to contact me if I can be of assistance to you and your membership as we begin to explore the options with this project. I will continue to advise you as we progress.

Subsequent to the issuance of this letter there were some meetings between the Carrier and Organization Representatives at which the Carrier's alleged need to attain labor cost savings, including the possibility of leasing to non-union operators who would "remove craft lines", was discussed. When those meetings, which addressed among other proposals the renegotiation of existing collective bargaining agreements, did not prove productive, the Carrier entered into the lease and sale arrangements described above.

In early 1993 SP confirmed its intent to lease approximately 3,000 miles of track in Oregon to a subsidiary of an entity known

as Genessee and Wyoming Industries (hereinafter "GWI"). The Organizations have entered as exhibits and made reference to local newspaper accounts in which it was reported that GWI had pledged to spend eleven million dollars on the branch lines over the lease period, and that SP was entering the lease arrangements as a way to escape high labor costs and work rules under its collective bargaining agreements. It was further reported that approximately two hundred SP employees in Oregon would lose their positions as the result of the lease program.

In its description of the factual background in this case, in its pre-hearing brief, the Organizations delineate the number of employees in each involved craft or class who were associated with the work performed on the West-Side and the East-Side and the so-called Molalla branch lines. In this factual description, the Organizations, seeking to demonstrate the adverse impact upon employees associated with the subject lines, referred to documentary exhibits which included abolishment notices issued beginning in December, 1992. These notices indicate, for example, that on the West-Side Lines, three machinist, four boilermaker, nine electrician, nine laborer, seven sheet metal worker, eleven engineer, and eighteen maintenance of way positions were listed for abolishment; and that there would be a reduced dispatcher work load and the relocation of the signal maintainer at Albany.

Since the consummation of the leases and sale, the record evidence indicates that there has been little if any change in the manner of operation or the movement of traffic or the volume of traffic associated with the subject branch lines, and that a number of SP positions associated with the lines have been abolished. The evidence of record also establishes that the lessees, in many cases, are paying their employees, some of whom are former SP employees, three to five dollars per hour less in wages than similarly-situated employees earn with the SP.

In its presentation and briefs, the Carrier has referred to the proceedings before Presidential Emergency Board No. 219. Prior to the lease and sale arrangements involved in the instant case, Presidential Emergency Board No. 219 (hereinafter "PEB No. 219") was established on May 3, 1990 to consider numerous disputes between all rail labor organizations, except the IAM&AW, and rail management. One of the issues submitted by rail labor for PEB No. 219's consideration was the so-called "Line Transfer Dispute". In its submission of this issue to PEB No. 219 and in its recommendation for resolution of the Line Transfer Dispute, rail labor stated as follows:

> Beginning in April 1988, the rail labor organizations served notices on the carriers to negotiate an agreement to deal with the manner in which employees are and will be affected by the carriers' decision to transfer existing rail lines to other entities, either existing or newly-formed rail carriers, for continued rail operations by those other entities. Rail labor's notices proposed an agreement that would deal with this adverse impact in the following manner: the proposed agreement would prohibit the carriers

> from reducing the number of employees in service as of a certain date; protect an employee's level of compensation; require advance notice of any transfer of any interest in a rail line and, if requested, the negotiation of an implementing agreement; require the selling carrier to include a successorship obligation in any contract selling or transferring a rail line for continued operations; provide treble damages to employees who may be wrongfully deprived of benefits under the agreement; and provide for the creation of a special board of adjustment to resolve any dispute over the interpretation or application of the agreement.

While PEB No. 219 addressed numerous issues applicable to the individual crafts or classes who participated in the proceedings, the Line Transfer Dispute was not the subject of PEB No. 219's Report.

Evidence in the record also establishes that prior to the instant transactions the SP had engaged in the following branch line dispositions; (1) the Eel River, Carlota, Korblex and Samoa branch lines in California were sold to the Eureka Southern Railroad on December 25, 1984, (2) the Santa Cruz branch line in California was sold to Roaring Camp on May 10, 1985, (3) the Lake County, Oregon branch line was sold to Lakeview on October 29, 1985, (4) the Susanville, California branch line was leased to the Quincy Railroad on November 17, 1985, (5) the Hayden, Arizona branch line was sold to the Copper Basin Railroad on May 30, 1986, (6) Llano, Texas branch line was sold to the City of Austin on June 30, 1986, (7) the Tillamook, Oregon branch line was leased and sold to the Port of Tillamook Bay on September 27, 1986, (8) the Napa, California branch line was sold to the Napa Valley Wine Train on December 30, 1986, (9) the Bayou Sale,

Cypremort and Houma, Louisiana branch lines were sold to the Louisiana Delta Railroad on December 30, 1986, (10) the Globe, Arizona branch line was sold to the Arizona Eastern Railroad on October 7, 1988, (11) the Arvin, Clovis, Coalinga, Exeter, Oil City, Richgrove, Stratford and Visalia, California branch lines were leased to the San Joaquin Valley Railroad in January, 1992, (12) the Gonzales, Texas branch line was sold to the Texas, Gonzales and Northern Railroad on February 23, 1993, and (13) the Douglas, Arizona branch line was sold to the San Pedro & Southwestern Railroad on February 23, 1993.

As will be more fully discussed below, the SP has argued that in none of these transactions did the Organizations assert that the Carrier was prohibited by its agreements from selling and/or leasing low density rail lines.

While the parties have not been able to stipulate as to the precise issues before the Board, the general questions are, as stated by the Organizations, whether the involved transactions violate the existing collective bargaining agreements, generally, and the scope clauses, specifically, and whether the evidence shows bad faith on the part of the Carrier in consummating the leases and the sale.

Position of the Organizations

The Organizations submit that the Board was created to consider contract interpretation issues arising as the result of

the Carrier's decision to transfer to three newly-formed carriers the right to perform what the Organizations characterize as SP's "gathering and distribution" functions on several of its branch lines in Oregon. The Organizations contend that the SP has agreed, as an essential part of its collective bargaining agreements with the Organizations, that craft work of the SP, which is to be performed on and in connection with the branch lines, will be performed by SP employees who hold the requisite seniority. The Organizations assert that the SP has breached those commitments by transferring its branch lines in the Willamette Valley in Oregon to the three newly-formed carriers for those carriers to perform the SP's branch line work for the benefit of the SP and as agents for the SP.

The Organizations argue that it is significant that the Carrier does not dispute the Organizations' contentions that the SP, through its express agreements with the Organizations, by custom and practice, and through the fact that the agreements are negotiated by the exclusive representatives of the particular craft or class, has agreed that the work of the Carrier within the scope of those agreements shall be reserved for employees who hold the appropriate seniority under those agreements. The Organizations maintain that the Carrier cannot dispute this contention because it is axiomatic that every contract must have a subject matter, and the subject matter of each of the collective bargaining agreements at issue is the Carrier's craft

work. In support of this principle, the Organizations cite In Re BLE and Louisiana and Arkansas Ry., NRAB (1st Div.) Award No. 351, June 4, 1935 (Swacker). The Organizations also argue that the SP's leasing and selling its branch lines in Oregon breached the Carrier's commitment to have craft employees perform craft work, because the SP did not relinquish its need to perform that work when it transferred the subject branch lines. Rather, the Organizations argue that the SP entered into the line transfer agreements in order to strengthen its presence in the markets it served in the areas of those branch lines. The Organizations maintain that the evidence of record establishes that the SP decided to enter into these transactions because the Carrier had concluded that a lower cost operator, who also dealt directly with the shippers on those lines (something the SP was unwilling to do), could retain the existing traffic on those lines and, most likely, could generate additional traffic from those lines. The Organizations submit that the evidence of record further establishes that the SP concluded that such arrangements would benefit the Carrier's overall profitability. In support of this contention, the Organizations point out that the SP was not willing to abandon those markets nor was it willing to allow its competitors, the Burlington Northern and Union Pacific Railway Companies, to gain any of that traffic; a likely occurrence if the SP relinquished its control over the traffic lines. The Organizations opine that, consequently, the SP structured the

line transfers so that the new operators were required to interchange all interline movements with the SP and were prohibited from dealing with any other rail carrier.

The Organizations submit that in order to achieve its objectives, the SP arranged for the new operators to act as the Carrier's agent for all interline movements on the subject branch lines, and the SP prohibited the newly-formed carriers from acting on behalf of any other rail carrier. The Organizations point out that the SP, in the lease and related agreement provisions, included monetary penalties, which prohibited the new carriers from interchanging traffic with anyone else but the SP. As an example, the Organizations point out that the lease with the W&P provides that the monthly rent for the lines is $175,000; but if the W&P does not interchange any cars with a carrier other than the SP, then the new operator will receive a credit of $174,900 against the normal monthly rent. The Organizations point out, additionally, that the trackage rights agreement with the W&P includes a monthly rental of $100,000, which is reduced to $100 if the W&P does not use the trackage rights to interchange with any carrier, except the SP. The Organizations assert, in sum, that the Carrier transferred its Oregon branch lines to the new carriers, but restricted those carriers' independence in order to assure the SP's continued control over their markets.

The Organizations maintain that these restrictions are unique to the SP, and require a finding that the new operators are agents of the Carrier for the movement of all interstate traffic. The Organizations contend that the restrictions upon the new carriers' operations are such that those new carriers operate in interstate commerce solely for the benefit of the SP. The Organizations submit that all interline traffic, which the new operators move on those lines, is "gathering and distribution" traffic, moves for the benefit of the SP, under SP contracts or rates, and for the account of the SP. The Organizations point out that the SP bills the shippers and pays the new operators, as switching carriers, a charge for each movement. The Organizations argue, in other words, that the new carriers are performing train movements and all related work for the benefit of the SP and under the control of the SP. Accordingly, the Organizations contend that these actions violate the applicable collective bargaining agreements which provide SP craft employees with the right to perform that labor for the SP.

The Organizations state that the SP seeks to justify its actions by asserting that it has the managerial prerogative to sell, lease or otherwise transfer its rail assets, and that any subsequent event to implement that decision cannot be deemed to be a violation of the collective bargaining agreements. The Organizations argue that there is no merit in the Carrier's position. First, the Organizations submit that it is clear that

a rail carrier can enter into an agreement to limit its managerial prerogatives, and that said rail carrier is not free, thereafter, to ignore those restrictions whenever it concludes that it should exercise what has become a limited prerogative. In support of this principle, the Organizations cite the Washington Job Protection Agreement of 1936. Secondly, the Organizations contend that the decision which the SP has made in this case does not involve the Carrier's "leaving the market", the type of managerial prerogative which the courts have considered is being exercised in the typical line sale case, because the SP has no intention to leave the branch line markets. The Organizations point out that, in fact, the SP has done everything it could to strengthen its presence in and its control over those markets. The Organizations assert that the decision made by the SP in this case is one concerning the utilization of its work force and how best to have its "gathering and distribution" work performed. The Organizations maintain that this type of management decision is one which the courts have uniformly held requires bargaining and compliance with the status quo obligations, and, thus, cannot in any way be viewed as relieving the Carrier of its existing contractual obligations.

Based upon the foregoing facts and arguments, the Organizations submit that the SP's attempts to justify its actions as an exercise of unlimited managerial right must fail and be rejected.

Position of the Carrier

The Carrier contends that the bargaining history concerning the Organizations' proposed limitations regarding shortline transactions submitted before PEB No. 219 is uncontested. The Carrier points out that those proposals applied to both sale and lease transactions, and that the Organizations' Section 6 notices sought a blanket prohibition upon any type of branch line disposition. The Carrier argues that the Organizations' proposals regarding line dispositions made before PEB No. 219 are virtually identical to the arguments made before this Board. The Carrier then compares the proposals and arguments before PEB No. 219 made by rail labor and the arguments presented to this Board. For example, the Carrier points out that the Organizations in this case claim, as a central premise, that the branch lines are still viable and thus will be used for "continued rail operations"; and then point out that this argument is virtually identical to the assertion made before PEB No. 219, to the effect that carriers violated collective bargaining agreements by disposing of rail lines where there would be such "continued rail operations". Additionally, the Carrier submits that rail labor, as did the Organizations here, argued before PEB No. 219 that the work being performed on the branch lines "belonged" to the members of the crafts or classes under the existing collective bargaining agreements.

The Carrier maintains that PEB No. 219 rejected rail labor's attempt to place any limits on branch line transactions, and that such rejection forecloses the Organizations' claims in the instant case. The Carrier submits that had the agreements prohibited branch line transactions, there would have been no need for rail labor to seek contractual limitations via the collective bargaining process before PEB No. 219.

The Carrier then points to the "Moratorium Clause" in the Report of PEB No. 219, and characterizes the provision as "extremely broad"; and points out that the Special Board, established by statute for purposes of clarifying or modifying the Report of PEB No. 219, found that all matters involving "subjects which were referred to in notices served during the present round of negotiations are barred until January 1, 1995." The Carrier asserts that the "subject" of branch line disposition was contained in the Organizations' Section 6 notices and was discussed at length before PEB No. 219. Accordingly, the Carrier argues that sustaining the Organizations' position in this case would have the same effect as granting to the Organizations the terms and limitations proposed in their Section 6 notices.

The Carrier further contends that the Organizations bear the burden of proving their claim that the Carrier violated the collective bargaining agreements by selling and/or leasing lines in Oregon. The Carrier maintains that the Organizations cannot point to any provisions in the agreements which limit the ability

of the Carrier to sell and/or lease rail lines or which limit the structure or terms of such transactions. The Carrier argues that the Organizations' Section 6 notices seeking to limit line dispositions prove that the agreements contain no limitation on shortline transactions. The SP in support of this contention refers to what it states is "one prior decision" that held that a Section 6 notice regarding the subject of shortline dispositions may not be served when a moratorium clause is in effect; UTU and NRLC Joint Interpretation Committee, March 20, 1987 (Arbitrators Peterson and Kasher).

The Carrier asserts that co-existent and commensurate with the right to sell or lease branch lines is the ability to complete the transaction without reference to scope, seniority and/or furlough provisions in the agreements. The Carrier states that if the SP is contractually authorized to engage in a shortline transaction, it follows that the SP is authorized to take those related actions necessary to implement that corporate decision. The SP maintains that, as the Carrier has the right to sell and/or lease low density branch lines, all actions which logically flow from that right are also proper under the agreements.

The Carrier submits that if the collective bargaining agreements prohibited shortline transactions, there would have been no need for the Organizations to serve the Section 6 notices seeking to prohibit such transactions.

The Carrier posits that the arbitration process is used for the purpose of interpreting disputed provisions in a collective bargaining agreement; and cannot and should not be used to create contractual terms or to negotiate terms when the parties have been unable to do so. The Carrier points out that this Board's jurisdiction is confined to interpreting and applying agreements, and that the Board must function within that limited jurisdiction. The Carrier suggests that if the Organizations seek to obtain restrictions on shortline transactions those limitations should be achieved through collective bargaining and not arbitration.

The Carrier maintains that there is no agreement provision prohibiting shortline transactions, and thus the Carrier's right to sell and/or lease rail lines to independent shortline operators must be read in the context of court decisions which have upheld a carrier's right to make fundamental decisions concerning the future direction of its business. In support of this contention, the Carrier cites P&LE v. RLEA, 491 U.S. 490 (1987) and several other decisions by the federal courts. The Carrier argues that these citations are particularly applicable in the instant case.

The Carrier points out that the record evidence establishes that the SP's shortline program is an integral part of its overall business plan and strategy to restore profitability; that virtually all major rail carriers have engaged in shortline

transactions and rationalized their physical plants in view of the competitive realities of rail transportation; and that the courts, in the absence of a collective bargaining agreement prohibition, have upheld a rail carrier's right to engage in such transactions.

The Carrier further points out that the Interstate Commerce Commission (hereinafter the "ICC") has actively encouraged the creation of shortline and regional carriers through a public policy that has been in place since 1986. The SP submits that it is the only Class 1 carrier that has not engaged in significant shortline transactions; and that similar shortline transactions have received approval from the ICC.

The Carrier maintains that while the Organizations may disagree with the ICC's refusal to impose employee protection in cases involving shortline transactions, they cannot use the collective bargaining agreements to remedy those concerns.

Based upon the foregoing facts and arguments, the Carrier requests that the Organizations' claims be denied.

Findings and Opinion

In its reply brief/submission, the SP iterates its claim that the subject matter of branch line leases and/or sales is not governed by the provisions in the collective bargaining agreements cited by the Organizations; and that past practice of the SP in consummating branch line sales and leases, as well as

evidence regarding other Class 1 carriers' engaging in such transactions without objection from rail labor, supports the Carrier's underlying position that there is no merit in the Organizations' claims.

In its post-hearing brief/submission, the Organizations dispute the Carrier's assertion that rail labor's unsuccessful proposal to negotiate an agreement regarding shortline transfers establishes the Carrier's contractual right to sell and/or lease rail lines. The Organizations argue in their reply that the SP can point to no agreement provision which gives the Carrier the right to transfer its assets to another and for that new entity to perform the SP's labor.

Those arguments focus this Board's attention upon the central issue; that is, what rights and obligations flow from the scope and seniority provisions in the collective bargaining agreements cited by the Organizations which are applicable to the lease and sale transactions involving the Oregon branch lines. While that is the main focus of the Board's attention, the parties have discussed a number of ancillary factual, operational and legal subissues which should, to some extent, be addressed.

First, while there are many facts and issues in dispute, it is uncontroverted that the SP has, for some time, faced significant financial problems which have been recognized by at least two Presidential Emergency Boards, established pursuant to Section 10 of the Railway Labor Act, as well as by the rail labor

organizations themselves. For example, PEB No. 219 recommended that the rail labor organizations "sympathetically examine the situation [the SP's ability to pay Class 1 carrier wage rates]"; and, in fact, as a result of the Emergency Board's recommendations, the SP was not required to pay the same wages as were other Class 1 railroads to crafts or classes subject to the Emergency Board's jurisdiction, which wage increases had been recommended and required by the statutory imposition of PEB No. 219's recommendations.

The Carrier's financial condition is not being considered because of its direct relevance to the instant dispute, but is being discussed in order to put into proper factual context the circumstances attendant to the Carrier's lease and sale of the Oregon branch lines. This factual context establishes, without question, that the leases and sale were consummated in an environment of serious economic problems. The documentary evidence of record further establishes that the lack of profitability on the Oregon branch lines was the major motivating factor for the Carrier's determination to find other operators to lease and/or buy those lines; and while standard railroad labor costs contributed, in part, to the SP's decision to lease and sell the Oregon branch lines, as will be more fully discussed below, the evidence does not establish that the desire to achieve lower labor costs was the prime or sole factor which led the

Carrier's Plant Rationalization planners to recommend the Oregon branch line transactions.

After fully considering the substantial testimony and documentary evidence in this record regarding the Oregon branch lines transactions and the extent to which the parties met and discussed those transactions before they were consummated, this Board finds insufficient evidence in the record to conclude that the Carrier (1) was motivated exclusively by its desire to reduce labor costs when it leased and sold the branch lines, (2) was guilty of engaging in "bad faith" in its dealing with the labor organizations prior to consummating said agreements, and/or (3) was party to a "sham" agreement with any outside operator, which operator had been created exclusively for the purpose of avoiding collectively bargained contractual obligations.

First, as noted above, there is overwhelming evidence in this record to establish that the Carrier did not have the ability, based upon existing operating costs, to continue to run the branch lines and not suffer financial shortfalls. Labor costs associated with the Oregon branch lines were only one ingredient in the financial mix. For example, the fact that the new operators did commit to spend in excess of eleven million dollars to upgrade the branch line operation supports the conclusion that the line transactions were not motivated exclusively by labor cost considerations.

Secondly, there is insufficient showing to establish that the Carrier failed to "step forward" in a timely and constructive effort to negotiate some arrangement whereby an employee purchase of the lines option or the renegotiation of collective bargaining agreements could have provided an alternative facility for the retention of the Oregon branch lines within the operational control of the Carrier. Such arrangements or negotiations are complex and difficult, at best, and the evidence does not support a finding that the Carrier was not sufficiently forthcoming so that its efforts can be characterized as having been exercised in "bad faith".

Thirdly, there is insufficient evidence in this record to establish that the W&P, the WVRY and/or the MWRY are not bona fide carriers engaged in the business of railroading for the purpose of obtaining a profit through their operating efforts. This Board has no factual basis to challenge the evidence in the record regarding the independence of the shortline operators or the Carrier's assertion that it entered into long-term leases with reputable and established shortline operators for the East and West Side Lines. Nor is there preponderant evidence which would establish that the SP exercises control over the operations on those lines, or that the SP has an ownership interest in the shortline operators or their parent companies, or that the SP is involved in the management and/or supervision of the shortline operators' employees. Accordingly, there is no reason for this

Board to conclude that there is a "corporate veil to be pierced" for the purpose of establishing that the W&P, the WVRY and/or the MWRY are controlled by the SP.

Based upon the Organizations' Section 6 notices served in 1988, there is some substantial merit in the Carrier's position that the line transfer transactions in this case are of the type which the Organizations sought to address through the negotiation of protective and/or other forms of compensation.

Subsequent to the issuance of the Report of PEB No. 219 on January 15, 1991, the Congress of the United States established, pursuant to Public Law 102-29, a "Special Board". This Special Board was charged with considering requests for clarification or modification of the Emergency Board's Report.

In the context of the issues before this Board, the following excerpt from a Request for Modification made by the Shopcraft Unions, found in Carrier Exhibit "F", is significant. The Modification Request was addressed to the "Moratorium" recommendation made by PEB No. 219 in Section "O" of its Report. PEB No. 219 recommended that there be a "moratorium period for all matters on which notices might properly have been served when the last moratorium ended on July 1, 1988 to be in effect through January 1, 1995". In seeking to modify the moratorium, specifically insofar as "Line Sales on a Case-by-Case Basis" was concerned, the Shopcraft Organizations posited as follows:

As interpreted by this Board [the Special Board], the PEB's recommended moratorium is "all-inclusive", barring from the RLA [Railway Labor Act] bargaining process until January 1, 1995 "[a]ll matters involving subjects which were referred to in notices served during the present round of negotiations". Unless modified, this moratorium would prevent the organizations from requesting a carrier to bargain over the effects of a line sale or similar transaction which is not subject to Interstate Commerce Act protective conditions. The foreclosure of bargaining over the effects of transactions which directly result in the elimination of jobs is wholly inequitable.

There can be no denying that the issues of the carriers' ability to engage in line sales and similar transactions over the unions' objections and the effect of such transactions on carrier employees were of paramount importance in the relationship between the organizations and the carriers in the past five-seven years. The Section 6 Notices which the organizations served in this bargaining round sought to establish a uniform set of procedures and protections which would apply in such situations. The carriers counterproposed a uniform buy-out process. The PEB recommended an agreement which did not address any uniform treatment of line sales and similar transactions.

Because of the dire impact a line sale transaction can have on an employee's very livelihood, this Board should modify the PEB's recommended moratorium to allow an organization to pursue an agreement to ameliorate that impact when a line sale is contemplated. Such a limited exemption from the moratorium would be transaction-specific; that is, any notice served by the union would be directed at the effects of a specific sale on a particular group of affected employees. Allowing the union to address the effects of a transaction in this way would not result in the transaction being stopped or otherwise prevented from going forward as contemplated by the selling carrier and acquiring non-carrier. It would merely permit the union an opportunity to convince the carrier of the hardships which may result from the transaction and to obtain appropriate relief to soften the blow for the employees who are affected.

In the P&LE case, the Supreme Court specifically held that such matters are bargainable. See, Pittsburgh & Lake Erie Railroad Co. v. RLEA, ____ US ____, 105 L.Ed. 2d 415, 435 (1989).

There remains no other effective way for the unions to obtain any consideration for their members affected by a line transfer. The employees may not succeed in obtaining the relief they seek, but on an issue of this importance to their continued employment, they certainly are entitled to an opportunity to try.

> This Board should be aware that prior to April 1988, when this bargaining round started, the carriers consistently argued that union notices to bargain over the effects of line sales were barred by the moratorium provisions in the last national agreements. Any dispute over a union's right to serve such a notice, they maintained, raised a minor dispute. See, Decision of Joint Interpretation Committee, Article XVI, National Mediation Agreement of October 31, 1985, United Transportation Union and National Carriers' Conference Committee (March 20, 1987; Kasher and Peterson, Arbitrators) (Attached hereto as Exhibit A).
>
> The Board should also be aware of what the carriers, armed with a moratorium preventing bargaining over line transfers, can and will do. Burlington Northern, for example, recently told the Washington State Senate that it engaged in a program to "create" short lines and continues to hold a financial interest in short lines over and above freight car interchange agreements.

In spite of this well-articulated equitable plea and similar positions advocated by other rail labor organization representatives, the Special Board, in a report issued on July 18, 1991, rejected rail labor's request to modify PEB No. 219's moratorium provisions, and thus the subject matter of line sales/transfers was reserved for bargaining in the next round of negotiations under the provisions of the Railway Labor Act.

The above-quoted excerpt can lead to no other conclusion but that rail labor was seeking to establish "a uniform set of procedures and protections which would apply in such situations"; showing rail labor's recognition that it needed some facility to address "issues of the carriers' ability to engage in line sales and similar transactions over the unions' objections". Additionally, there is recognition that "There remains no other effective way for the unions to obtain any consideration for

their members affected by a line transfer". In this Board's opinion, if rail labor had a clear and unequivocal remedy in the various scope and/or seniority provisions of applicable collective bargaining agreements, it is unlikely that it would have cast its prayer for relief from the moratorium in the context of its members having no way to obtain "any consideration" for a line transfer.

This Board also recognizes the difference between a "minor" dispute and a "major" dispute, as those terms of art are respectively defined by Section 3 and Sections 5 and 6 of the Railway Labor Act. The Board further recognizes that the Organizations here have directed their focus at the scope and seniority provisions of the applicable collective bargaining agreements, and argue that the transactions here violate those provisions.

However, while various courts have relied upon the premise that disputes of the type here are "minor" disputes, those decisions do not, in the opinion of this Board, establish that there is agreement language which supports the position of the Organizations.

This Board has found that the Oregon branch line transfers were bona fide, even if the new operators are engaged primarily in what the Organization characterizes as a "gathering and distribution" function. This Board agrees with the Carrier's contention that merely because the Oregon branch line

transactions (1) redound to the Carrier's benefit, (2) are structured in such a way that allows the Carrier to "remain in the market" and (3) contain significant incentives in the leases for the new operators to interchange exclusively with the SP does not result in a conclusion that the collective bargaining agreements' scope and seniority provisions have been violated.

This Board is obligated, if the Organizations' claims are to be sustained, to find some support in the provisions of the collective bargaining agreement for such a conclusion; and as the Organizations claim that the Oregon branch line transactions violate the collective bargaining agreements, it is, in this Board's opinion, their obligation to point to specific language and/or past practice and/or a manifestation of mutual intent which would establish that the parties agreed that transactions like the Oregon branch line leases and sale could not be consummated without the Organizations' consent or if such transactions were unilaterally consummated by the Carrier they would violate the collective bargaining agreements. Before it would be proper for this Board to resolve the "merits" of the Organizations' claims, this Board must first find that transactions such as the Oregon branch line leases and sale were specifically addressed in the agreements of the parties. It is enlightening, in this regard, to consider the decision of Special Board of Adjustment No. 1018. That Board considered a matter involving CSX Transportation Inc. and twelve rail labor

organizations and/or separate divisions of those organizations, eight of whom are parties before this Board. In addressing the question of a line sale by the CSX, insofar as it impacted upon the parties' respective collective bargaining agreements' rights and obligations, Special Board of Adjustment No. 1018 observed as follows:

> Contrary to Carrier's contention that the RIF or furlough provisions are so "broadly drawn" as to permit job abolishments for any reason, including line sales, this Board finds that such contention is not dispositive. Even assuming, arguendo, that the RIF or furlough provisions were intended to include line sales, there is simply nothing in these provisions to indicate that the agreement negotiators contemplated, anticipated or intended that this language would apply to line sales in such a manner as to bar the filing of Section 6 Notices, thus depriving the Organizations of statutory recourse to the Railway Labor Act.
>
> Thus, it is clear that there is nothing in these agreements which prohibits the sale of the Carrier's assets; the Carrier is free to do so, and the Organizations do not disagree. It is equally clear, however, that there is nothing in these agreements that waives the right of the Organizations to invoke their statutory rights to bargain over the effects of such sale on the employees they represent. (SBA No. 1018, CSX and Various Labor Organizations, pages 17-18, December 18, 1988, Arbitrators Dennis, Marx and Zumas)

While Special Board of Adjustment No. 1018 was considering a "line sale" in the context of agreement provisions concerning the right to issue abolishment notices, the rationale of Special Board of Adjustment No. 1018, just cited above, is, for all practical, structural and contractual purposes, equally applicable in this case. Reviewing the applicable scope and seniority provisions in the collective bargaining agreements,

this Board cannot find or discern any specific language or implied intent which would apply to the question of leasing and/or selling branch lines. Accordingly, there is no ability to render an interpretation as to how a line transfer should be viewed in the context of said scope and/or seniority provisions.

What is clear is that the scope and seniority provisions in the subject collective bargaining agreements were negotiated years before the federal government determined that "deregulation" was a panacea for the transportation industries' ills. With deregulation, rail carriers obtained greater opportunities and flexibilities to engage in the type of transactions which are the subject matter of this dispute; and the ICC refrained, in many cases, from imposing the standard-type of protective conditions in such matters. As a result, many Class 1 railroad jobs have been lost; but that result does not require a finding that specific terms in collectively bargained agreements have been violated.

There is substantial equity in the detailed and well-presented arguments of the Organizations. However, this Board is constrained to conclude that there has been no violation of agreement provisions. In the absence of specific agreement language addressing the subject matter of line transfers and/or prohibiting the types of transactions engaged in by the SP with the W&P, the WVRY and the MWRY and/or in the absence of a mutually recognized past practice of long-standing, which would

prohibit such transactions absent agreement of the parties, this Board has no basis upon which to conclude that there has been an agreement violation.

Accordingly, this Board concludes that the Organizations' claims that the scope and seniority provisions were violated by the Oregon branch line leases and sale should be denied.

Award: The Organizations' claims are denied in accordance with the above findings. This Award was signed this 9th day of August, 1993.

Richard R. Kasher

Richard R. Kasher, Arbitrator

ATTACHMENT B

PUBLIC LAW BOARD NO. 59-

In the Matter of Arbitration

Between

Transport Workers Union of America

And

Consolidated Rail Corporation

Jack A. Warshaw, Neutral Member

T. Grandfield, Organization Member

A.J. Licate, Carrier Member

For the Organization:

James J. McEldrew, III, Esq.

Robert S. Hawkins, Esq.

Appearances:

For the Carrier

BACKGROUND

This is an arbitration proceeding between the Transport Workers Union of America thereinafter "Organization") and Consolidated Rail Corporation (hereinafter "Carrier"), pursuant to the provisions of the parties' agreement to establish a Public Law Board to resolve a dispute between the parties.

The Board was established after the Organization filed a grievance protesting certain line sales planned by the Carrier, and then sought an injunction in U.S. District Court to prevent the Carrier from consummating the transactions. No further proceedings in the Court action have occurred pending the outcome of the proceedings before this Board.

The Board held a hearing in Philadelphia, Pennsylvania on January 16, 1997, during which time the parties presented oral arguments, and offered Submissions and accompanying Exhibits for inclusion in the record. At the request of the neutral member of the Board, the parties provided the Board with supplemental materials after the conclusion of the hearing, and provided written answers for the record to several questions posed by the neutral member. The last of these written responses was received on February 5, 1997, at which time the record in these proceedings was closed.

QUESTION AT ISSUE

The parties have agreed that the question at issue in these proceedings is the following:

Does the Carrier's decision to sell approximately 1,770 miles of track, and to enter into "Conrail Express" agreements with the purchasers of such track, violate the Scope Rule contained in the parties' collective bargaining agreement?"

APPLICABLE PROVISIONS OF THE AGREEMENT

SCOPE

It is the general intent of the Company and the unions that subject to the Exceptions herein, any and all work set forth in the Work Classification Rule herein which can reasonably and practicably be performed by the employees covered by this Agreement shall be assigned to such employees rather than to any contractor or sub-contractor.

It is agreed that, subject to the exception in Article I above except where specifically provided for in Article III(a) and subject to the exceptions with regard to work performed by outside concerns contained in Article III hereof, work specified in the Work Classification Rule (Article V) will not be contracted to outside concerns without the consent of the unions' designated representative.

III. Exceptions:

(b) Cleaning freight cars; provided, however, that at points where such work was, on the effective date of this Agreement, being performed exclusively by employees covered by this Agreement it shall continue to be performed only by such employees.

(e) Work performed by other railroads or terminal companies in the normal course of operations.

NOTE:

(2) The sale or lease by the Company to an outside concern, or Company-owned and controlled, or affiliated concern, of any facility or equipment and the acquisition from said concern or any affiliate thereof within a reasonable time thereafter by purchase, lease or otherwise of said facility or equipment, in a rebuilt, upgraded or repaired condition or of another rebuilt, upgraded or repaired facility or unit of equipment of the same or similar kind shall be considered as a contracting out of said work of rebuilding, upgrading, or repairing and can be done only to the extent that other provisions of this Article III permit the contracting of such work.

(3) The Company will not sell or lease facilities or equipment owned by it for the performance of work covered by this Agreement for the purpose of evading the restrictions on contracting out of work contained in this Agreement, provided, however, that this paragraph will not apply to any transaction subject to approval by the Interstate Commerce Commission, or any coordination of facilities with another railroad as defined by the Agreement of May 1936, Washington, D.C.

STATEMENT OF FACTS

In January of 1996, the Carrier announced a decision to sell approximately 1,770 miles of rail freight lines. The Carrier's previous history of selling rail lines was summarized in a deposition by James W. Dietz, the Carrier's Director of Asset and Capital Planning:

Since its creation in 1976, Conrail has continuously studied its lines to assure their adequate profitability and from time to time has sold assets that did not demonstrate adequate profitability to new operators. Other such assets were abandoned. According to the R-1 report filed with the Interstate Commerce Commission (now the Surface Transportation Board), Conrail reduced its route mileage from 19,222 at the end of 1977 to 10,701 at the end of 1995. Since 1990, Conrail has sold approximately 2,315 route miles of track to about 60 different purchasers which thereafter undertook to operate them as shorelines.

...Conrail has, on a continuing basis, examined its secondary and branch lines to determine whether such lines provide an adequate return on the investment they require. When there is not an adequate return on the capital required to maintain a line in accordance with standards of safety and efficiency, such lines are identified for sale or abandonment. This process of rationalizing the Conrail system is ongoing.

Conrail continued to study its route structure to identify possible sale or abandonment candidates in 1995. At that time, Conrail determined that its fundamental, main line route structure consists of the lines crisscrossing from Chicago to Philadelphia and Baltimore and from St. Louis to Bos ton and Northern New Jersey/New York City via Albany. These lines form a big XU. Accordingly, in the 1995 Business Plan, Conrail made the

commitment to allocate the necessary capital to the "Big X" lines. However, because the "Big X" lines consumed a large percentage of Conrail's capital budget, all "Off X" lines - including the Camden, New Jersey cluster of lines ("the Camden Cluster") were reviewed rigorously. The working assumption was that all "Off X" lines would be sold or abandoned unless they proved that they should be retained by Conrail.

The 1995 analysis by my group lead to the decision to sell 1,770 miles of rail freight lines, including the Camden Cluster. In January, 1996, Conrail announced that as a result of these studies, it would seek buyers for those lines.

On April 26, 1996, the Carrier announced the creation of a "Conrail Express" program. While the parties disagree sharply over the fundamental nature and purpose of this program, it is appropriate to review previous Carrier marketing initiatives, together with the Carrier's view of the nature of the "Conrail Express program, as recounted in a deposition by James 14. Hartman, Jr., the Carrier's Director-Asset Utilization:

For years, Conrail has worked to retain the main-line transportation of freight that originates or terminates on lines that are sold. Continuing to participate in the business generated by the shortlines is important for Conrail and its employees. If Conrail fails to retain this business, the traffic will move over the highways or the rails of a competing carrier. Conrail's past efforts to retain the line-haul transportation of freight from sold lines have included, at various times: maintaining cooperative business relationships with purchasers of the sold lines and with shippers on those lines; keeping existing freight rates in effect such that the shipper paid a single rate for the shipment of freight over both Conrail and a connecting shortline; continuing to have Conrail bill the shipper for freight that originated or terminated on sold lines and was interchanged with Conrail; negotiating financial incentives for shippers and connecting shortlines to utilize Conrail for the main-line transportation of freight that originated or terminated on sold lines; and establishing in the early 1980's a Marketing Group whose sole focus was shortline traffic.

On April 25, 1996, Conrail announced a marketing program known as "Conrail Express." Conrail Express agreements are simply licensing agreements pursuant to which a connecting shortline obtains the right to use the service mark "Conrail Express" on its locomotives (together with the carrier's own name and markings) and certain incidental advantages, including discount prices (which are not less than Conrail's fully allocated cost) for various services and access to Conrail's volume discount purchasing program. The operator must nevertheless disclose that it owns and operates the line.

The Organization took an entirely different view of the "Conrail Express" initiative, and on September 30, 1996, filed the following grievance with the Carrier:

This letter will state the grievance of Transport Workers Union of America with regard to the sale by Consolidated Rail Corporation of Con Rail facilities and equipment to various short lines.

The sales include but are not limited to the following:

1. Sale of Pavonia Yard to Rail Tech;

2. Sale of Lycoming Valley, Juniata Valley and other lines that make up "Con Rail Express" to SEDA-COG Joint Rail Authority and others.

These sales and others like them, violate the "Scopes provision of the Collective Bargaining Agreement, as specified in Note (3) to the exceptions (page 6 of the Agreement).

We believe that the current plan to sell some 1400 miles of Con Rail track to other short lines will violate the Collective Bargaining Agreement in the same manner as do the sales mentioned above.

On the following day, October 1, 1996, the Carrier issued a WARN notice advising of a mass layoff scheduled for December 1, 1996, in connection with the Camden Cluster sale. A total of 122 positions, including 14 Carmen positions, were scheduled to be abolished at the following locations: Pavonia Diesel Terminal:

Pavonia Car Shop; Pavonia Yard Office; Millville, Burlington, Haddon Heights, Winslow and Mickleton, New

Jersey; and Morrisville, Pennsylv.. .a.

On October 15, 1996, the Carrier replied to the Organization's grievance, and advised the Organization that:

Consistent with our prior practice and announcements, Conrail intends to continue the sale of lines and facilities that are not productive, and which do not provide a satisfactory return on capital.

On November 6, 1996, the Organization filed a Complaint in Equity against the Carrier in the United States District Court for the Eastern District of Pennsylvania. The Complaint reads in pertinent part as follows:

6. Conrail is currently engaged in selling approximately 1,770 miles of its track, together with the facilities adjacent to it and equipment to operate over it, to various "short line" operators in Pennsylvania, New Jersey, Connecticut, Ohio, Indiana, Michigan, New York, Maryland, Delaware and other New England states.

7. These "short line" operators, which are independently owned and incorporated, exist as non-union companies beyond RLA jurisdiction. However, they are designed to function as part of a new promotional entity called "Conrail Express" which Conrail will market to the public.

8. Upon information and belief, predicated on Conrail's own public statements about the operation of "Conrail Express", Conrail will control and manage many aspects of the administrative affairs of these Short lines operators who will function as part of "Conrail Express" in their dealings with customers including, but not limited to billing, pricing administration, equipment supply and car tracing. The operations of these Conrail Express companies will be coordinated by Conrail with its own operations, and they will serve as "pickup and delivery" agents for Conrail, performing jobs which employees represented by THU plaintiffs now do for Conrail, and allowing Conrail to concentrate on its "core routes." The public will view the intermingled operations of the Short line" companies and Conrail as a single "Conrail-backed seamless service."

9. The provisions of the collective bargaining agreement ("CBA") between Conrail and TWU has very specific arrangements, particularly the "Scope" clause of the CBA, which regulates who may perform work for Conrail, that severely limit the circumstances under which such work may be transferred or assigned to workers employed by companies other than Conrail...

11. Upon information and belief, on December 1, 1996, Conrail intends to close two announced sales of track, facilities and equipment to "short line" operators. TWU Plaintiffs have members employed by Conrail presently working at the locations involved in these sales. One sale involves Conrail's Pavonia Yard facilities in Philadelphia to a "short line" operator called Rail Tech. The other involves sale of track, facilities and equipment in the Lycoming and Juniata valleys of Pennsylvania, among other places, to SEDA-COG Joint Rail Authority.

12. As soon as TWU became aware that Conrail was beginning to implement its plan to create "Conrail Express", it filed a grievance protesting that the sale of Conrail facilities and equipment to "short line" operators was a violation of the "Scope" provisions of the CBA...The grievance remains unresolved between the parties and will have to be adjudicated before a statutory Public Law Board.

13. This Court must grant an injunction to preserve the Public Law Board's jurisdiction to hear and determine TWU's grievance by enjoining the proposed sales until such time as the Public Law Board has ruled on TWU's grievance, for, if the sales take place on December 1, 1996, TWU's members at the affected locations will lose their jobs, and Conrail will be physically divided in an irreparable manner, before the Public Law Board takes up TWU's grievance...

On December 3, 1996, the Carrier informed the Court that the sale of the Camden Cluster had been "postponed to a date no sooner than February 1, 1997." On the same date, the parties agreed to establish this Board to adjudicate the dispute, and, pending the outcome of the Board's proceedings, the parties have not proceeded further in the U.S. District Court action.

CONTENTIONS OF THE PARTIES

The Organization's Contentions:

The Organization contends that, with respect to the Scope Rule, the various duties that comprise the work accruing to Carmen are expressly reserved for that craft, save for a group of exceptions that are among the most narrow that can be crafted. Moreover, a plethora of statements by the Carrier, as well as explicit language contained in the boilerplate contracts between the Carrier and those short lines it has designated as "Conrail Express" carriers, verify that "Conrail Express" is no more than a scheme devised by the Carrier in an effort to evade the Agreement.

The Organization maintains that the Scope Rule expresses the parties' intent that Carmen's work be firmed by Carrier Carmen to the exclusion of any subcontractors' except within narrowly defined exceptions. These limited exceptions are further narrowed by the conditions noted at the end of the "Exceptions" portion of the Scope Rule.

Note (2) to the "Exceptions" prohibits the sale or lease of equipment or facilities to an outside concern, or company-owned or controlled, or affiliated concern, and the subsequent acquisition of the same or similar equipment or facilities in a rebuilt, upgraded or repaired condition.

Note (3) prohibits the sale or lease of facilities or equipment "for the purpose of evading the restrictions on contracting out of work" specified in the Scope Rule, but exempts "any transaction subject to approval by the Interstate Commerce Commission, or any coordination of facilities with another railroad as defined by the Agreement of May 1936, Washington, D.C."

Given the exhaustive treatment of exclusions and conditions in the Scope Rule, the Organization argues, it is indisputable that the parties intended only the type of contracting out that was explicitly provided. The parties must be deemed to have considered, and rejected, all other varieties of subcontracting scenarios beyond those included in the Scope Rule.

The Organization contends further that, in contrast to many other types of Scope Rules, the entitlement by Carmen to this work is not based on their exclusive performance of any particular duty, except for the work of cleaning freight cars. Thus, all of the functions and duties specified in the Scope Rule express the parties' joint understanding of the work that accrues to the Carmen's craft, and, in applying the roster of duties to a dispute over the performance of work by non-Carmen, a demonstration of exclusivity is required only with respect to the work of cleaning freight cars.

The Carrier is absolutely prohibited, the Organization maintains, from selling or leasing equipment or facilities for the purpose of evading the Agreement, and the "Conrail Express" scheme does not fit into either of the definitions of excepted transactions in Note (3) of the Scope Rule:

The exception referring to the 1936 Washington Job Protection Agreement (hereinafter "WJPA") is inapplicable, since the creation of "Conrail Express" did not result in any coordinations, as that term is defined in WJPA. The ICC exception also does not apply: while some or all of the "Conrail Express line sales may have been filed with and/or approved by the ICC's successor, the Surface Transportation Board (hereinafter "STB"), that fact alone does not satisfy the exception, based on the Organization's review of the recent legislative history concerning labor protective provisions.

The Organization notes that prior to the Staggers Rail Act in 1980, the ICC routinely imposed labor protection in transactions under Sec. 10901 and its predecessors. However, by the mid-1980s the ICC regularly denied protection. Despite this shift in policy, the ICC retained the authority to require labor protection in Sec. 10901 short line transactions for the remainder of its existence. Therefore, the structure upon which the exceptions in Note (3) were based remained intact, despite Staggers.

With the enactment of the ICC Termination Act of 1995, however, many of the duties of the ICC were transferred to the STB. The Act had an enormous impact on the subject of labor protection, and an entirely new protective mechanism was created, which, the Organization maintains, has great bearing on the instant case.

The Organization contends that because the safety net provided by ICC imposition of protective conditions, in transactions that do not involve WJPA-protected coordinations, has been destroyed by the ICC Termination Act of 1995, the conditions upon which the limited exceptions were granted by the Organization in Note (3) no longer exist. Consequently, the Carrier cannot rely upon any STB approval of any "Conrail Express" transaction as the basis for exemption from the requirements of Note (3).

The Organization notes that the parties are presently engaged in an effort to resolve a major dispute over labor protective benefits, which arose when Section 6 notices were cross-served on November 1, 1994, nearly fourteen months prior to the enactment of the ICC Termination Act. From this, the Organization argues, two conclusions cannot be avoided:

First, since the conditions under which one of the exceptions in Note (3) operates were materially changed by Congress, simply replacing the letters "ICC" with the letters "STB" does not satisfy the purpose of the exception. Second, because the material change occurred after the parties began bargaining, and since that bargaining continues as this Board considers the dispute, the Organization cannot be deemed to have acquiesced that the statutory change does not require a corresponding change in the language of Note (3).

The Organization contends further that the performance of Carmen's work by "Conrail Express" carriers on cars owned or under the control of either "Conrail Express" or the Carrier constitutes impermissible contracting out. It argues that the "Conrail Express" scheme is designed, among other things, to evade the prohibitions in the Scope Rule against the sale or lease of equipment or facilities to an outside concern, or Company-owned or controlled, or affiliated concern, and the subsequent acquisition of the same or similar equipment or facilities in a rebuilt, upgraded or repaired condition.

Note (2) to Section III contains the parties' agreed-upon definition of subcontracting, and a recent Award from Public Law Board No. 5573, Consolidated Rail Corporation and Transport Workers Union of America, Arbitrator Scott E. Buchheit, establishes the manner in which Note (2) should be applied. That Board found that the Carrier's lease of its Central Avenue Repair Facility in Detroit, Michigan, to RR&A, Inc., violated the Scope Rule, because some of the work performed by RR&A at the facility had previously been performed there by Carmen. The Organization noted the following language in that Board's decision:

...Carrier cannot avoid its responsibility under the Scope Rule based upon its argument that RRA performs work at Central Avenue for its own benefit. It is true, as argued by Carrier, that the evidence establishes that RRA is an enterprise independent of Carrier. Carrier, however, is assigning to RRA work to be performed at Central Avenue over which it has the option of determining the disposition of the cars for repairs. Carrier previously had this work done at Central Avenue exclusively by Organization members. In these circumstances, Carrier is effectively contracting to RRA work which was and still is protected at Central Avenue by the Scope Rule.

Note (2) is relevant to the "Conrail Express" scheme, the Organization continues, for two reasons. First, all "Conrail Express" carriers are "Company-controlled" in several ways. Second, to the extent that equipment or facilities are sold or leased to "Conrail Express" carriers for use as part of the "Conrail Express scheme, and repairs are performed on equipment or repair facilities are used to perform such repairs that were otherwise covered by the Scope Rule prior to the transaction, such work is deemed by the language of Note (2) to have been contracted out in violation of the Agreement.

Moreover, the repair by "Conrail Express" of any equipment for which the Carrier has control or responsibility as a spool operator" under AAR rules, as well as the use of any "Conrail Express" facility for repairing such equipment, also is violative of Note (2).

The Organization contends further that the Carrier's control of "Conrail Express" establishes the nature of the relationship as being between principal and sub-contractor. A careful examination of the relationship between the Carrier and the "Conrail Express" carriers, the Organization argues, establishes beyond any question that "Conrail Express" is nothing more than a scheme designed to evade the Scope Rule's restrictions against contracting out.

There are seven specific ways in which the Carrier's control over "Conrail Express" is documented by the Carrier's own public statements and by the terms of the boilerplate "Conrail Express" agreement:

(1) the Carrier's power to grant and deny "Conrail Express" status, asserted in the very preamble of the boilerplate agreement;

(2) the Carrier's control over the extension or abrogation of Conrail Express" contracts;

(3) the relationship as defined in the boilerplate agreement between the Carrier and all "Conrail Express" carriers;

(4) establishment and enforcement of standards of performance by "Conrail Express carriers;

(5) advertising, merchandising, and use of the "Conrail Express" service mark;

(6) commingled personnel recruitment and training, purchase of equipment and supplies, and marketing; and

(7) approval of and adequacy of "Conrail Express" liability insurance coverage.

The Organization contends finally that the reason for the creation of "Conrail Express" is simple, and has often been stated. To the public, there is but a single face of Conrail. The improvement, however, is "seamless", "hassle-free" service, unencumbered by restrictive Agreement work rules like the Scope Rule in dispute before this Board. When the evidence concerning each of these areas is considered, there can be no conclusion other than that "Conrail Express" is a scheme designed to evade the Agreement's restrictions on contracting out of work, and any work performed or facilities used, as covered by the Scope Rule, is subcontracting that is prohibited by the Rule.

The Carrier's Contentions:

The Carrier contends that there is nothing in the Agreement to prohibit the Carrier from selling lines or from maintaining ongoing business relationships with the purchasers of those lines, as in the Conrail Express" agreement.

It argues that the Agreement's Scope Rule does not prohibit line sales or the Company's continuing business relationship with the purchasers of those lines. In its statement of claim and in conferences, the Organization has relied on Note (3) to the Scope Rule. However, Note (3) prohibits only the transfer of "facilities or equipment...for the purpose of evading the restrictions on contracting out of work contained" in the Agreement.

The Carrier's announced sale of approximately 1,770 miles of track is not a transfer of "facilities or equipment...for the purpose of evading" the Scope Rule. There is no evidence that the Carrier will, as part of the transaction, send the Carrier's equipment to a purchaser for the purpose of having the purchaser's employees perform work contractually reserved to Carrier employees.

The Carrier maintains that it has the right, under existing agreements and past practice, to sell lines. A purchasing carrier's performance of its own work on former Carrier lines or shops does not violate the Scope Role. Section III(e) of the Scope Rule expressly permits other railroads such as purchasing carriers to perform "work in the normal course of operations."

Moreover, the Carrier continues, there is no evidence that the Carrier's line sales are "for the purpose of evading" contractual subcontracting restrictions. To the contrary, the Carrier's line sales are based on the Carrier's decision as to how to allocate its capital.

Furthermore, Note (3) contains an express exception for sales that are "subject to approval by the Interstate Commerce Commission." Each of the Carrier's line sales is a transaction subject to approval by the ICC, now the STB.

The Carrier contends that it has no ownership interest in the connecting carriers that elect to be part of the

Conrail Express program. In fact, one of the lines covered by Conrail Express agreements were never owned by the Carrier.

Nothing in the Conrail Express agreement, the Carrier argues, changes the fundamental relationship between the Carrier and the owners of the affected lines; the Carrier and the connecting carriers remain completely separate companies, interchanging traffic as they would with any other connecting carrier. The independence of these connecting carriers from the Carrier is demonstrated by the following:

(1) The Carrier does not have an ownership interest in the purchaser. The purchaser is the true beneficial owner of the line with its own officers and directors, none of whom are officers or directors of the Carrier.

(2) The purchaser pays in cash for the lines and must invest its own capital to the purchase, securing its own financing which is provided by lenders and investors wholly independent of the Carrier.

(3) The entrepreneurial risk of the venture stays with the purchaser. If the new venture fails, the purchaser will lose the capital that is invested. If the purchaser becomes insolvent, ownership of the sold line does not revert to the Carrier.

(4) The Carrier does not control the labor relations of the purchaser. The purchaser simply gives Carrier employees first consideration for employment.

(5) The purchaser takes title to the land, trackage and facilities of the shortline. The Carrier gives the purchaser a quitclaim deed to the property and executes an assignment of all of the Carrier's other rights in the land such as easements, licenses, permits, etc.

(6) The purchaser has sole responsibility for pricing and billing of all intraline traffic, and sole responsibility for collection of all demurrage and payment of all car hire charges.

(7) In connection with the transition from the Carrier's ownership to the purchaser's, there is a strict apportionment of all ongoing costs.

The independence of the Conrail Express carriers is further reflected by the fact that several established and reputable railroad entities have agreed to become part of the Conrail Express program.

The Carrier contends further that the position taken by the Organization in this case has been rejected in a major arbitration brought by several national Rail Labor organizations, which asserted a similar claim in Special Board of Adjustment No. 1069, Southern Pacific Transportation Co. and American Train Dispatchers Association, et al., August 9, 1993. Arbitrator Richard R. Kasher. This decision and a second decision issued by SBA No. 1069 on June 18, 1994 squarely rejected the argument that a Scope Rule, Seniority Rule, or restrictions on subcontracting prohibited a Carrier from selling lines or seeking to retain the main-line transportation of freight from the shortline through economic incentives and marketing.

Moreover, the Carrier argues, in the two most recent national rounds of collective bargaining, all of the national Rail Labor organizations, including TWU, sought unsuccessfully to add restrictions or protective conditions with respect to line sales. The Carrier remains in mediation with the Organization and BRC with respect to the Section 6 Notices served by the Organization on November 1, 1994. This bargaining history demonstrates that the existing agreements do not prohibit the Carrier's actions

The Carrier contends that it has a long and well-established practice of selling lines and seeking to maintain the main-line transportation of freight that originates or terminates on the sold lines. Never, before the present claim, has the Organization filed or progressed a claim asserting that the Carrier's existing agreements prohibit such sales or continuing business relationships with the purchasers.

The Carrier contends finally that no provision of the Agreement prohibits the Carrier from selling branch lines or from seeking to maintain the main-line transportation of traffic that originates or terminates on the sold lines. Furthermore, the Carrier's decision to sell lines is a decision as to how to allocate the Carrier's capital assets. In the absence of clear contract language to the contrary, such a decision is within the Carrier's retained

management prerogative.

FINDINGS AND CONCLUSIONS

In reaching its decision in this case, the Board finds authoritative guidance in two decisions of Special Board of Adjustment No. 1069, Southern Pacific Transportation Company and American Train Dispatchers Association, et al., Arbitrator Richard R. Kasher, issued respectively on August 9, 1993 and June 18, 1994.

These two decisions involved a similar claim and a factual situation similar to the one in the instant case.

In the August 9, 1993 decision, after reviewing contentions by several organizations that certain line sales and leases by the carrier, coupled with incentives designed to retain main-line hauling business for the carrier, violated the scope and seniority provisions of the applicable collective bargaining agreements, the Board framed the issue as follows:

Those arguments focus this Board's attention upon the central issue; that is, what rights and obligations flow from the scope and seniority provisions in the collective bargaining agreements cited by the Organizations which are applicable to the lease and sale transactions involving the Oregon branch lines.

The Board then made the following findings:

...this Board finds insufficient evidence in the record to conclude that the Carrier (1) was motivated exclusively by its desire to reduce labor costs when it leased and sold the branch lines, (2) was guilty of engaging in "bad faith" in its dealings with the labor organizations prior to consummating said agreements, and/or (3) was party to a "sham" agreement with any outside operator, which operator had been created exclusively for the purpose of avoiding collectively bargained contractual obligations.

...there is insufficient evidence in this record to establish that the W&P, the WVRY and/or the MWRY are not bona fide carriers engaged in the business of railroading for the purpose of obtaining a profit through their operating efforts. This Board has no factual basis to challenge the evidence in the record regarding the independence of the shortline operators or the Carrier's assertion that it entered into long-term leases with reputable and established shortline operators for the East and West Side Lines. Nor is there any preponderant evidence which would establish that the SP exercises control over the operations on those lines, or that the SP has an ownership interest in the shortline operators or their parent companies, or that the SP is involved in the management and/or supervision of the shortline operators' employees. Accordingly, there is no reason for this Board to conclude that there is a "corporate veil to be pierced" for the purpose of establishing that the W&P, the WVRY and/or the MARY are controlled by the SP.

This Board has found that the Oregon branch line transfers were bona fide, even if the new operators are engaged primarily in what the Organization characterizes as a "gathering and distribution" function. This Board agrees with the Carrier's contention that merely because the Oregon branch line transactions (1) redound to the Carrier's benefit, (2) are structured in such a way that allows the Carrier "to remain in the market" and (3) contain significant incentives in the leases for the new operators to interchange exclusively with the SP does not result in a conclusion that the collective bargaining agreement's scope and seniority provisions have been violated.

There is substantial equity in the detailed and well-presented arguments of the Organizations. However, this Board is constrained to conclude that there has been no violation of agreement provisions. In the absence of specific agreement language addressing the subject matter of line transfers and/or prohibiting the types of transactions engaged in by the SP with the W&P, the WVRY and the MWRY and/or in the absence of a mutually recognized past practice of long-standing, which would prohibit such transactions absent agreement of the parties, this Board has no basis upon which to conclude that there has been an agreement violation.

In its June 18, 1994 decision, SBA No. 1069 ruled separately on the organizations' claim that the transactions in question constituted a subcontracting arrangement, thus triggering the provisions of the September 25, 1964 National Agreement. In denying the claim, observations:

the Board made the following pertinent ...the Organizations have sought to protect their constituents from the adverse affect of line sales/leases in the collective bargaining forum, before the appropriate administrative agencies, before a Presidential Emergency Board and a Special Board created by the United States Congress, and in the Federal Courts.

Leases and sales of rail lines are transactions that have been historically subject to the regulatory authority of the ICC. If, as some argue, the ICC has, over the past ten years or so, abandoned its practice of ensuring that rail employees adversely affected by the sale or lease of rail lines are protected, that battle is properly waged before the ICC, in the federal courts, in the collective bargaining arena, and/or in the United States Congress.

If, on the other hand, it could be shown that the transactions regarding the Oregon branch lines were not bona fide sales or leases, but rather that the lessee and purchaser operators were de jure or de facto subcontractors, then there would be a justiciable dispute properly joined before this Board.

However, as this Board has previously concluded, based upon the review and consideration of a very weighty evidentiary record, there is insufficient evidence to conclude that the new operators were alter egos of the SP over which the SP had control, as a contractor would have over a subcontractor.

It should be noted that the Organization disputed the findings of SBA No. 1069, and relied instead on a decision by Public Law Board No. 5573, Consolidated Rail Corporation and Transport Workers Union of America, Arbitrator Scott E. Buchheit. That case involved a factual situation where the carrier leased out a maintenance and repair facility, and later sent rail cars to the facility for the specific purpose of having work performed on the cars which had previously been performed by members of the Organization at the same facility.

The Board in PLB No. 5573 found that:

Carrier, however, is assigning to RRA work to be performed at Central Avenue over which it has the option of determining the disposition of the cars for repairs. Carrier previously had this work done at Central Avenue exclusively by Organization members. In these circumstances, Carrier is effectively contracting to RRA work which was and still is protected at Central Avenue by the Scope Rule.

The Board emphasizes, however, that its determination in this matter is a narrow one based upon the particular facts and circumstances here present. More specifically, while the Organization made a number of broad and sweeping arguments in support of the instant claim, ultimately it made clear that the only facility and work at issue in this case was at Central Avenue. The Board has now likewise limited the scope of its holding to the Central Avenue facility and finds it unnecessary for purposes of properly resolving this claim to make determinations as to coverage of the Scope Rule for work performed at locations other than Central Avenue. [emphasis supplied]

There is no evidence in the record that the Carrier in the instant case intends to engage in the kind of transaction with Conrail Express operators as was described in the above decision. The Board thus concludes that the decision of PLB No. 5573 is a narrow one, and limited to the peculiar factual situation of that case, whereas the decision of SEA No. 1069 is of broad scope, and directly applicable to the facts of the instant case.

Turning then to the factual record before us, the Board concludes, in the light of the findings of SBA No. 1069, that unless the Organization can prove by substantial evidence that the line sales and accompanying Conrail Express agreements are "for the purpose of evading the restrictions on contracting out of work contained in this Agreement", as specified in Note (3) of the Scope Rule, then there has been no violation of the Agreement.

In order to do this, the Organization has the burden of proving that the contractual arrangement between the Carrier and Conrail Express operators constitutes one between principal and agent, or, for Agreement purposes, between Carrier and subcontractors. This the Organization has failed to do.

While it is true that the parties to the Conrail Express agreements have entered into a cooperative relationship for some elements of their operations, the agreement appears to be a good faith marketing initiative, and is

consistent with the Carrier's prio.. arketing initiatives, as it sought various w.. to retain the main-line hauling of freight, while at the same time divesting itself of unprofitable lines.

There has been no demonstration that the Carrier exercises any significant control over the operations of the Conrail Express carriers. Among other considerations, the Carrier has no ownership interest in the purchasers of these rail lines, there are no common directors or officers, and the Carrier is not involved in the management or supervision of the purchaser's employees. The purchaser must secure independent financing and pay in cash for the acquired lines, and in return receives a quitclaim deed and an assignment of all of the Carrier's other rights in the property.

It is also of significance that the arrangement encompasses carriers who were not party to any of the Carrier's line sales transactions, since two of the Conrail Express carriers, the Grand Rapids Eastern Railroad and the Mid-Michigan Railroad, are established railroads which have never purchased any Carrier property.

Finally, the fact that the Carrier receives important commercial advantages from the Conrail Express arrangement does not, as noted by SBA No. 1069, result in a conclusion that the Agreement has been violated.

The Board thus is constrained to conclude that the transactions in question appear to be arms-length transactions with bona fide carriers, that no relationship of principal and agent exists between the Carrier and Conrail Express carriers, and that the transactions consequently do not constitute subcontracting in violation of the Scope Rule of the Agreement.

AWARD

The question at issue is answered in the negative.

Jack A. Warshaw, Neutral Member

T. Grandfield, Organization Member

A. J. Licate, Carrier Member

Dated: 2/12/97